

A
T R E A T I S E
OF THE
L A W
OF
P A R T N E R S H I P.

BY WILLIAM WATSON,
OF LINCOLN'S-INN, ESQ.

Societas jus quoddam fraternitatis in se habet.

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TO THE
RIGHT HONORABLE
ALEXANDER Lord LOUGHBOROUGH,
LORD HIGH CHANCELLOR OF GREAT-BRITAIN,

THIS WORK IS
(BY HIS LORDSHIP'S PERMISSION)
HUMBLY DEDICATED,
WITH A PROFOUND RESPECT FOR
THE TALENTS, ERUDITION, AND JUDGMENT,
HAPPILY BLENDED WITH
THE MANNERS OF A GENTLEMAN,
WHICH HAVE RENDERED HIS LORDSHIP
SO DISTINGUISHED AN ORNAMENT
OF THE BRITISH NATION.

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INTRODUCTION.

DURING the progress and advancement of Commerce in *Great Britain*, Partnership engagements have been found highly useful to the cultivation and extension of particular concerns, and very conducive to the mutual benefit of persons, whose separate capitals, or individual labor and industry, would have been too limited for many objects easily attainable by their united operation. It seems therefore natural and proper to apply some attention, in these introductory remarks, to the subject of Commerce in general, with a view to trace out the sources from whence the advantages of trading in a joint stock proceed; before entering upon the consideration of the law by which Partnership is regulated and governed.

It is difficult to fix the precise time when commercial dealings by the intervention of money first began in the world; or to trace with much accuracy the several stages of commercial credit to its present height in this country.

The exchange of goods preceded the commencement of merchandize by the use of any common measure of value. The first moveable property used for such common measure, to estimate and ascertain the price of other things, seems to have consisted in cattle; hence the wealth of persons was described by the size of their herds and flocks. Thus also in *Homer* (a) the armour of *Glaucus* and *Diomedes* are valued, one at an hundred oxen, and the other at nine. Whether we understand his meaning literally, or only as a mode of describing the value by a comparison of price, the allusion comes to the same point; and with the like allusion money, and indeed every species of estate and property was among the *Romans* named *Pecunia*, from *Pecus*.

The use of metals, as the most convenient standard of common value, or price to be paid upon the transfer of property, is of very ancient date. We trace it back in sacred history to the days of the patriarch *Abraham*: In profane history we find it under *Midas*, and also under *Janus* who was the most ancient (b) of the gods in *Italy*.

And according to *Heathen Mythology* *Mercury* was the God of Merchandize.

(a) *Il.* b. 6. l. 236. ἱκαντόμυβοι ἐνεαβόων.

(b) *Juv.* 6. 393.

Thus

Thus *Julius Cæsar* informs us that the ancient *Gauls* attributed the invention of commerce to him. He is said to have his name *a mercibus* ; *est enim mercatorum Deus, præest-que Lucro* (c).

In this country merchandize and commerce have been largely and liberally protected ; And although, the ancient municipal laws of the realm seem to have been formed without any view to the present existing state of our extended commerce ; yet many positive institutions have been introduced, and at different periods ingrafted into our laws for the benefit of trade both foreign and domestic. These institutions have been gradually combined with those of other countries and matured into a system, called the *LAW MERCHANT*, which is a code of usages and customs founded on the basis of mutual justice, and universally adhered to by the *British* merchant.

The law merchant is noticed and recognized both in our own common and statute law (d) ; and in many instances has its own peculiar effect in questions between Merchants, much of its advantage resulting from the universality of its adoption. Indeed,

(c) *Ainsworth*, in verb. *Mercurius*. (d) 13 *Ed. 4. c. 9.*

x INTRODUCTION.

chiefly the *British* merchant, but with him, and for his benefit, *alien* merchants, belonging to countries in friendship with our own, may be considered as the particular favourites of the *British* Law, from times of high antiquity down to the present (e). And it is now universally agreed that commerce, advanced as it is, to a degree of height not aimed at by any of the traders of antiquity, is a subject worthy to employ the attention of philosophers, statesmen, and lawyers, as well as the industry and enterprize of merchants.

It is true, that prior to the reign of *Henry VIII.* the commerce of *England* was at a low ebb. In his time it greatly increased; but our ancestors remained comparatively ignorant of commercial affairs till they began to assume a degree of form and regularity, about the middle of the reign of *Queen Elizabeth* (f), whose protection and encouragement animated her subjects, to the formation of different trading companies, and the establishment of divers manufactories in her capital. At this period the genius of trade began to spread, and the true use of PARTNERSHIP was discovered; since which time, our

(e) Laws of *K. Alfred*, *Mirour*, c. 1. sec. 3. *Intr. Leg. Ethel.* c. 2. *Mag. Char.* c. 32. *Instit.* 37. *Molloy*, 318.

(f) Stiled the Commercial Reign, *Jones's Law of Bailments* p. 103

commerce, whilst continually enriching this country, hath contributed to make us free, and that freedom, which is the boast and glory of *Englishmen*, hath in its turn greatly extended our commerce.

It would be going far beyond the limits here proposed, to enter upon the discussion of any branch of the complicated and important question, how far Chartered Companies are useful or injurious to commerce. It is sufficient, that private voluntary partnerships in trade, are generally thought beneficial to commerce, by the merchants of *England*. Great benefits arise to the traffic of this country from its commodious situation for trade and commerce with all mankind, and from other local superiorities; but the best advantages could not always be made of these without *Fellowship*, and *Partnership Concerns*, which increase the merchant's credit, give energy to every undertaking, and afford additional counsel; whereby the *British* merchants have rendered their profession, not only in a high degree beneficial to the State, but most honorable and profitable to themselves.

Under such circumstances it appears somewhat singular that this branch of mercantile and legal science should never have been
treated

treated by any *English* writer in a systematic form, and that even the rules of authority and practice should remain scattered in the works of general writers, and reporters, without any attempt having been made to collect them prior to this Essay, at the conclusion of the eighteenth century.

It is indeed the observation of a popular writer(s), that “ Nothing upon the subject of
“ Partnership requires explanation, but in
“ what manner the profits are to be divided,
“ where one partner contributes money, and
“ the other labor; which is a common
“ case.”

Nevertheless in many recent instances questions of no inconsiderable importance have been decided both in the Courts of Law and Equity relating to various other topics arising out of partnerships in trade, besides those which are confined to the adjusting of contested rights and claims between partners themselves. And should the Author's humble endeavour to arrange them in their natural order prove useful in the smallest degree, his labors will be abundantly rewarded.

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A
T R E A T I S E
O F
The Law of Partnerships.

CHAPTER I.

Partnership—WHAT.

PARTNERSHIP is a voluntary contract, between two or more persons for joining together their money, goods, or labor, upon an agreement that the gain or loss shall be divided proportionably. And in such partnership-property each member hath one and the same species of interest; their title being undivided, whether each individual partner contributes exactly in the same proportion or not; but their several

B

veral degrees of interest must be regulated according to the agreed proportions, and the other conditions of partnership. The partners are themselves joint-tenants in all the stock and partnership effects ; and they are so not only of the particular stock in being at the time of entering into the partnership, but they continue joint-tenants throughout, whatever changes may take place in the course of trade ; for if it were otherwise, it would be impossible to carry on partnership trade. Thus it was held in the case of *Skipp v. Harwood*^a ; where a partnership was entered into in a brewery between *Skipp* and *Ralph* and *James Harwood*, and particular terms were then agreed on between them, that *Skipp* should have a certain proportion of the out-standing debts, and a lien and security on the partnership-stock to make that share of those debts good to him according to the value set on them, with a penalty in case of a breach. And we find the very same doctrine held by Lord *Mansfield* in the case of *Fox v. Hanbury*^b, only carried to a higher pitch ; for it is in this case determined that

^a 1 Vez. 242. reported under the title of *West v. Skipp*, but cited by Lord *Mansfield* in *Fox v. Hanbury* as above.

^b Cowper 449.

the assignees under a commission of bankrupt against one partner, can only be tenants in common of an undivided share, subject to all the rights of the other partner. And here his Lordship cited the words of Lord *Hardwicke*, “If a creditor of one partner
 “takes out execution against the partnership
 “effects, he can only have the undivided
 “share of his debtor; and must take it in the
 “same manner the debtor himself had it,
 “and subject to the rights of the other part-
 “ner.” So that one partner can have no right against the other, in his capacity of partner, but to what is due from him out of the joint-jock, after making all just allowances, let the fluctuations of trade be what they may. The whole of this doctrine seems to arise out of the very principle upon which partnership is founded, namely, probable profit, and the risk of loss; the advantages, or disadvantages, of which cannot, in common justice, be confined to one side only, but must be reciprocal throughout^c.

The different civil law writers have, in some degree, varied in their mode of considering

^c 12 Mod. 446.

partnerships, with relation to the nature of the contract itself. *Grotius* considers partnership to be a *mixt* contract.—And *Barbeyrac* in his Notes on *Puffendorff*^d observes that a partnership is contracted sometimes tacitly; when, for example, a thing being bought in common, is not parted, but the interested parties without explaining themselves further enjoy it equally, each taking the profit that arises, and contributing his own proportional part in the necessary expences for its maintenance: *societatem coire, et re, et verbis, et per nuncium posse nos, dubium non est*^e.

But *Puffendorff*^f observes that in partnership, tho' one contributes money and work, another only money, yet it does not seem to be a *mixt* contract. For a contract does not become mixt from the different performances, but from our agreements in matters of a different nature by one and the same covenant.

Partnership being a voluntary contract where the consent of the parties engaging therein is necessary for its formation, those

^d B. 5. c. 8.

^e Dig. lib. 17. tit. 2.

^f Lib. 5. c. 2. f. 10.

persons who hold any thing in common, independently of their own free will, cannot be deemed partners; and of this latter class are donees and the *legatees* of one and the same thing, or those who thro' other causes chance to hold something between them which is not divided, or is to be possessed in common without any mutual agreement. It is not enough to form a partnership, that two or more persons hold any thing in common among them, such as the *legatees*, *donees*, or *purchasers* of one and the same thing. For such ways of having something in common among many, not implying the reciprocal choice of the parties, cannot link them together in partnership. All the parties contracting ought reciprocally to chuse and approve of one another in order to form among themselves that sort of tie, which is a kind of brotherhood; *Societas jux quodammodo fraternitatis in se habet* &c. And it seems to have been an established and invariable rule that no partnership shall be contracted except it be of trade or commerce, or other thing that is honest and lawful; and all partnerships contrary to such rule would be unjust. As for instance, it would be contrary to equity and honesty,

§ Dig. l. 63. ff. pro. soc.

consequently unjust, if it should be agreed, that the whole loss should fall upon one of the partners without his having any share of the profits, and that the whole profits should go to another partner, without his bearing any share of the loss^h. *Si maleficii societas coita sit, constat nullam esse societatem generaliter enim traditur rerum inhonestarum nullam esse societatem*ⁱ. *Societas flagitiosæ rei nullas vires habet. Delictorum turpis atque fæda communio est*^k.

Such, then, being the nature of partnership contracts formed by mutual consent, for the reciprocal advantages which may probably arise from the joint stock put into partnership, there can be no doubt but, in a moral view, probity and fair dealing ought to have, in such a contract, an extent proportioned to that of the engagements entered into. *In Societatis contractibus fides exuberet*^l.

The very word Partner seems to import the substance of the thing; the name is derived

^h L. 57. ff. pro. soc. & stat.

ⁱ L. 35. f. 2. ff. de contr. empt.

^k L. 53. ff. pro. soc.

^l Inst. b. 3. pro. soc.

from *Pars*, a portion, or that which in division falls to each; and the properties of a partnership are derived from its unity, which is four-fold; the unity of interest, the unity of title, the unity of time, and the unity of possession: or, in other words, partners have one and the same interest accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

In partnership concerns there must be one and the same interest throughout, whether each individual partner contributes equally or not; if all parties contribute equally, each must receive or bear an equal share in the *gain* or *loss*; and where the partners contribute unequally it will only be necessary to have recourse to the laws of arithmetical proportion to adjust their respective shares.

This rule will equally apply, whether two or more partners join *labor*, or one finds *labor* and the other *money*; or each of them contributes both labor and money ^m.

In partnership concerns the several partners may be said to have an unity of *title*,

^m Puff. Law. p. 513.

because their interest in the stock and effects must be created by, or arise under, one and the same agreement. There must also be an unity of *time*, because the interest of each partner in the partnership property is created at one and the same periodⁿ. And, since it has been decided that partners are seised *per my et per tout*, both in antient and modern times, it follows that there must be an unity of *possession*, each partner being possessed by a moiety, and by all^o; that is they each of them have the entire possession, as well of every part as of the whole; each having an undivided moiety of the whole, and not the whole of an undivided moiety. Like the jointenants of a real estate, *Quilibet totum tenet et nihil tenet; scilicet, totum in communi, et nihil separatim per se* p.

Upon this principle Lord *Mansfield* seems to have determined that, if two are *partners* as *attornies* and *conveyancers*, and *one* of them receives money to be laid out on mortgage, the *other* is *liable* for the amount, though his partner should even have given a *sepa-*

ⁿ It is laid down as a general rule that joint estates must vest at once. Co. Lit. 188. a.

^o Smith v. De Sylva, Cowp. 471.

^p Braddon c. 5. Tr. 5. c. 26.

rate receipt for it. Thus it was decided in the case of *Willet v. Chambers* 9.

This was an action for money had and received to the plaintiff's use, brought against the defendant as *surviving partner* of one *Dadley*. Plea, *non assumpsit*. Verdict for the plaintiff, damages 480*l*.

Upon a rule to shew cause why a new trial should not be granted, the facts appeared to be as follows :

That *prior* to any partnership between the defendant and *Dadley*, who was an *attorney* and *conveyancer* at *Coventry*, the latter, in the year 1771, received of a Mr. *Bindley*, the sum of 350*l*. to be laid out on a real security : *Dadley* accordingly furnished him with a *mortgage* from a Mr. *Hughes* to that amount ; which, as it afterwards appeared, *Dadley* had *forged*. At *Midsummer* 1776 *Dadley* and *Chambers* entered into partnership : shortly after which *Bindley* wanted to call in his money. The pretended mortgagor was supposed at the same time to want a further sum of 150*l*. which added to the original mortgage money, made together

the sum of 500*l.* The plaintiff *Willet* was ready to advance this sum : and in consideration of his doing so, an assignment was made to him of the *pretended* mortgage before made to *Bindley*. As to 180*l.* part of this sum of 500*l.* *Willet* paid it into *Dadley's* office, to *Chambers*, who gave the following receipt for it: "Received of Mr. *Benjamin Willet*, the sum of 180*l.* for which I promise to account to him on demand — *Chambers.*" *Dadley* was not at home when this sum was paid. Some time after the plaintiff called at the office to pay 300*l.* more, part of the remaining 320*l.* due. *Dadley* being then at home, *Willet* paid the money to him ; and, in return, *Dadley* gave him the following receipt: "Received on account, of Mr. *Benjamin Willet*, 300*l.* the remainder of the money to be paid, being 20*l.* *Dadley.*" It was admitted that the defendant *Chambers* was in no respect privy to the forgery ; and that no *procuracion-money* was paid, either to *Chambers* or *Dadley*.

Serjeant *Hill* and Mr. *Green*, who shewed cause, argued, that this was not distinguishable from the common case of a surviving partner, who is always liable to partnership debts.

Mr. *Wallace*,

Mr. *Wallace*, Mr. *Newnham*, Mr. *Dunning*, and Mr. *Wheler*, *contra*, in support of the rule, contended, that this transaction was not within the compass of the partnership, which was for the purpose of carrying on the business of *attornies only*; not that of *scriveners*. A money scrivener is a person who receives money for the purpose of deriving some advantage from the receipt of it. But a mere conveyancer, as such, is by no means a money scrivener. His business is only to draw deeds and writings for the transfer of property from one man to another; and his profit arises from his bill of fees and charges for so doing. The two branches, therefore, though it may happen that they are sometimes exercised by the same person, are in themselves totally distinct and separate. If so, the fact of their being united in the partnership carried on between the defendant and *Dadley*, ought to have been proved; whereas the reverse is the truth of the case. For it is admitted they took no procuration money, and there is no evidence of any profit from the money in their hands. On the contrary, all that *Chambers* received, was punctually *paid over* to *Bindley*: that alone therefore would be an answer to the present demand. The receipts they gave, were
separate;

separate; not, "for partner and self;" but "for which I promise to account." In short, the whole of the transaction was entirely foreign to the partnership, and what each did, plainly shewed he considered the part he took in it, as his own separate act and deed only. Therefore, they prayed the rule might be made absolute.

Lord Mansfield. Both parties in this case undoubtedly are innocent; and the loss that will fall upon the defendant, if the law is against him, will be much greater than that which will be sustained by the plaintiff, if he fails. It is indeed so hard a case upon the defendant, that every leaning of the Court would be in his favour. But the question is, "Whether, *in point of law*, this engagement with *Dadley* does not make *Chambers* answerable?"

To go by steps.—It is necessary to see what the business was, which *Dadley* carried on alone, before his connection with the defendant in the year 1776. By admission of the counsel on both sides, it was the business of any *attorney* and *conveyancer*. By proof in the cause, it appears to have been a *great deal more*. For he had *many appointments*,

ments, though the nature of them is not particularly mentioned. He had also *agencies*, and was *clerk to a navigation*. But there is no pretence that he ever received *procuration money*. The business of conveyancing, in the very nature of it, as carried on in the country, is this: Where there is an attorney or counsel of credit, they receive money to place out upon securities; and persons who want to borrow, as well as those who want to lend, apply to them for that purpose. Their *profit* arises from *having the money* in their hands, before it is laid out upon the intended securities; and from their fees and *bill of charges* upon the conveyances they draw. It is not disputed but that this was the nature of *Dadley's* conveyancing business: He did not act however as a scrivener, who sometimes does not touch the money; but who in all cases gets *procuration money*. There is no proof of any transaction of that kind; nor indeed is it customary for attorneys, like him, to do so; for they get profit enough without it. I remember a case before me of a person who was trusted to the amount of many thousand pounds, in the manner I have stated; and *that* is the nature of the business. This was the business of *Dadley*, before the partnership. Let

us see then what was the nature of the partnership, afterwards entered into, between *Dadley* and the present defendant; whether it was a *general partnership* in all *Dadley's* business, or *confined to one particular branch* of it only; for to be sure, there *may be* such a *confined partnership*. The evidence as to this point consists in the heads and terms of an agreement entered into between them, which were afterwards extended and reduced into form. From them it appears, there was no particular restriction; it was not to be confined to suits, nor to conveyancing only, but they were to be *partners in the business* which *Mr. Dadley* carried on. Each was to be worth a certain sum. The profits are stated at 800*l.* Then it is agreed that a provision should be made for the family of which ever of them should happen to die first. And then comes the following *clause*, at the end, which, though not taken notice of by the counsel on either side, is very material indeed upon this occasion. My object, in examining it particularly, was to see whether it contained any restriction. The clause is this: “*Note, this scheme of partnership is intended to include all Mr. Dadley's present and future practice and appointments, such as agencies, navigation clerk,*
&c.”

Ec. but *not* to extend to any *public* office or place, which may at any future time be given to either of the parties." The only restriction therefore is that; or, more properly speaking, it is the only exception to this general partnership. Thus the partnership commences, without waiting for articles; and from that time, the *business* was carried on in partnership. One branch of that business, was *conveyancing*. Incident to *conveyancing* is, the *receiving of money* to place out upon securities. Receiving it *from the lender* to advance to the *borrower*, and acting for both parties respectively. From that, the profit arises; not from *procuration-money*, but from the money laying in their hands before it is placed out, from the charges and fees for drawing and engrossing the conveyances. The facts then are shortly these:--- The plaintiff *Willet*, wanting to place out a sum of 500*l.* applies to the office without making any distinction between the two partners. The first sum he advances is 180*l.* This he pays to *Chambers*, who gives a general receipt for it, not expressing it to be for *Dadley*, or for what, or whose use; but making himself accountable for the amount on demand. He receives it therefore, as the *principal*, *not* as the *agent* of *Dadley*: and
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it is admitted he knew the use, by placing it out upon the security for which it was put into his hands. The next sum, which is 300 *l.* is paid by the plaintiff to *Dadley*, who receives it exactly in the same manner as *Chambers* did the former sum; as *principal*; and gives a receipt for it, not as for so much money to be placed out, but as a sum for which he was to be accountable. The two sums together, come within 20 *l.* of what was wanted upon the security. Afterwards the bill for conveyancing is brought in. *Hughes* being the original mortgagor, if he had not been a fictitious person, and had wanted a further sum of money upon the assignment, *he* should have paid the expence of conveyancing. But the bill is brought in, to the plaintiff, and made out “debtor to *Chambers* and *Dadley*.” *Chambers* receives the money, and gives a receipt for it. In that transaction therefore, he is clearly considered *as a partner*, and the transaction itself as a *partnership transaction*. If *Dadley* had received procuration-money, and that kind of dealing had been excepted out of the articles; or, if separate accounts had been kept of the money got by these transactions, and it had all been set down to the profits of *Dadley* only, it might have varied the

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the case : and Mr. Justice *Asbhurst*, who tried the cause, would have been very glad to have given a direction in favour of the defendant. He suffers by the rascality of a man who had a very good character. I am very sorry for the defendant ; but upon this evidence I cannot say, but that it is a *partnership transaction*.

Mr. *Newnam* informed the Court, that the bill included other business, as well as the particular transaction of the mortgage.

Lord *Mansfield* said, *that* proves nothing, but that in general they were partners in the fees of conveyancing.

Per Curiam. Rule for a new trial discharged.

Every man who has a share of the profits of a trade, ought also to bear his share of the loss. And if any one takes part of the profit, he takes a part of that fund on which the creditor of the trader relies for his payment.

So also a man who advances money to a trader, and becomes interested thereby in the
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profits

profits of the trade, oftentimes makes himself a secret partner, though it does not in all cases conclude him so. And Mr. Justice *Blackstone* says, that the true criterion (when money is advanced to a trader) is to consider whether the profit or premium is certain and defined, or casual, indefinite, and depending on the accidents of trade. In the former case it is a *loan*, in the latter a *partnership*.

This distinction we find made in the case of *Grace v. Smith*^r, *Easter* term 15 G. 3. C. P. Here was an *assumpsit* for goods sold and delivered; and upon the trial, a verdict was found for the defendant. *Davy* moved for a new trial; the verdict, as he said, being contrary to law and evidence.

De Grey Chief Justice reported that this was an action brought against *Smiths*, alone as a secret partner with one *Robinson*, to whom the goods were delivered, and who became bankrupt in 1770. That on the 30th of *March* 1767, *Smith* and *Robinson* entered into partnership for seven years, but in *No-*

^r *Grace* against *Smith*, *Black.* 998.

^s See *Abbott v. Smith*, 2 *Black.* 947.

vember afterwards some disputes arising, they agreed to dissolve the partnership. The articles were not cancelled; but the dissolution was open and notorious, and was notified to the public on the 17th of *November 1767*. The terms of the dissolution were, that all the stock in trade and debts due to the partnership should be carried to the account of *Robinson* only. That *Smith* was to have back 4200*l.* which he brought into the trade, and 1000*l.* for the profits then accrued, since the commencement of the partnership: That *Smith* was to lend *Robinson* 4000*l.* part of this 5200*l.* or let it remain in his hands for seven years, at five *per cent.* interest, and an annuity of 300*l.* *per annum* for the same seven years. For all which *Robinson* gave a bond to *Smith*. In *June 1768*, *Robinson* advanced to *Smith* 600*l.* for two years payment of the annuity and other sums by way of interest, and gratuities, and other large sums at different times to enable him to pay the partnership debts, *Smith* having agreed to receive all that was due to the partnership, and to pay it's debts, but at the hazard of *Robinson*. That on the 1st of *August 1768*, the demands of *Smith* were all liquidated and consolidated into one, *viz.* 5200*l.* due to him on the dissolution of the partnership;

1500 *l.* for the remaining five years of the annuity, and 300 *l.* for *Smith's* share of a ship: in all 7000 *l.* for which *Robinson* gave a bond to *Smith*. That on the 22d of *August* 1769 an assignment was made of all *Robinson's* effects to secure the balance then due to *Smith*, which was stated to be 10,000 *l.* Soon after the commission was awarded.

Davy for the plaintiff insisted, that the agreement between *Robinson* and *Smith* was either a secret continuance of the old partnership, or a secret commencement of a new one; being for the retiring partner to leave his money in the visible partner's hands, in order to carry on his trade; and to receive for it twelve and a half *per cent.* profit, which could not be fairly done, unless it be understood to arise from the profits of the trade: and that he ought therefore to be considered as a secret partner. And he relied much on a case of *Bloxham* and *Fourdrinier* against *Pell* and *Brooke*, tried at the same Sittings (7th of *March* 1775) before Lord *Mansfield* in the *King's Bench*, as in point. "This was also a partnership for seven years between *Brooke* and *Pell*; but at the end of one year agreed to be dissolved, but no express dissolution

lution was had. The agreement recited, that *Brooke* being desirous to have the profits of the trade to himself, and *Pell* being desirous to relinquish his right to the trade and profits, it was agreed, that *Brooke* should give *Pell* a bond for 2485 *l.* which *Pell* had brought into the trade, with interest at five *per cent.* which was accordingly done. And it was further agreed, that *Brooke* should pay to *Pell* 200 *l. per annum* for six years, if *Brooke* so long lived, as in lieu of the profits of the trade; and *Brooke* covenants, that *Pell* should have free liberty to inspect his books. *Brooke* became a bankrupt before any thing was paid to *Pell*. And this action being brought for a debt incurred by *Brooke*, in the course of trade, Lord *Mansfield* held that *Pell* was a secret partner. This was a device to make more than legal interest of money, and if it was not a partnership it was a crime. And it shall not be in the defendant *Pell*'s mouth to say, "It is usury, and not a partnership."

Grose and *Adair* for the defendant argued, that the present case is very distinguishable from that of *Bloxham* and *Pell*. *Pell* was to be paid out of the profits of the trade, as appears from the covenant to inspect the books, which else would be useless. His

annuity was expressly given, as and in lieu of those profits. It was contingent in another view, as it depended on the life of *Brooke*, by whom those profits were to be made. In our case the annuity is certain, not casual; it does not depend on carrying on the trade, nor to cease when that is left off, but is due out of the estate of *Robinson*.

It is not a necessary dilemma, that it must be either usury or partnership. It may be, and probably was, a premium for the good-will of the trade. Two thousand guineas is no uncommon price for turning over the profits of a trade so beneficial, that it appears to have been rated at 1000*l.* to each partner in the space of less than eight months. And whether that sum is agreed to be paid at once, or by several instalments, it is the same thing. Besides, whether there be or be not a secret constructive partnership, is a question proper for a jury, who have here decided it on consideration of all the circumstances.

De Grey Chief Justice—The only question is, What constitutes a secret partnership? Every man who has a share of the profits of a trade, ought also to bear his share of the
loss.

loss. And if any one takes part of the profit, he takes a part of that fund on which the creditor of the trade relies for his payment. If any one advances or lends money to a trader, it is not lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in those profits; he relies on them for re-payment. And there is no difference whether that money be lent *de novo*, or *left behind* in trade by one of the partners who retires. And, whether the terms of that loan be kind or harsh, makes also no manner of difference. I think the true criterion is, to enquire whether *Smith* agreed to share the profits of the trade with *Robinson*, or whether he only relied on those profits, as a fund of payment: A distinction not more nice than usually occurs in questions of trade or usury. The jury have said this is not payable out of the profits; and I think there is no foundation for granting a new trial.

Could Justice—Same opinion.

Blackstone Justice, same opinion. I think the true criterion (when money is advanced to a trader) is to consider whether the profit or premium is certain and defined, or casual,

indefinite and depending on the accidents of trade. In the former case it is a *loan* (whether usurious or not, is not material to the present question) in the latter a *partnership*. The hazard of loss and profit is not equal and reciprocal, if the lender can receive only a limited sum for the profits of his loan, and yet is made liable to all the losses, all the debts contracted in trade, to any amount.

Nares Justice—Same opinion.

Rule discharged.

CHAPTER II.

Partnership,

HOW CONSTITUTED.

HAVING, in the foregoing chapter, endeavoured to point out the nature of partnership, and also the manner in which partnership property is possessed; I shall next proceed to inquire how a partnership is constituted, or what will make a person subject as a partner.

Partnership is constituted by *agreement*, which is either *expressed* or *implied*, but, which must be voluntary between the parties, and ought to be without fraud or deceit. The word *agreement*, is derived from the Latin, *aggregatio mentium*, which seems to express the joining together of two or more minds in any thing done, or to be done.

The Court of Chancery in carrying *agreements* into execution, govern themselves by a moral, not a mathematical certainty^a.

^a 2 Atk. 20.

So, that if two or more merchants join together in general trade, or for the performance of any particular branch of business with mutual interests in the profit and loss, they are to be considered partners, being subject as joint-traders. And although a Court of Equity will not in general *entertain* a bill for a specific performance of contracts for *chattels*, or which relate to *merchandize*, but leave it to *law*^b; yet in cases of partnership, notwithstanding it is in relation to a *chattel* interest, a specific performance ought to be decreed.

Thus in the case of *Buxton v. Lister and Cooper*^c, where the defendants entered into an *agreement* for the purchase of several timber trees, marked and growing at the time it was reduced into writing; and, on the first of *November* 1774, the following memorandum was signed by the parties.

“ *Matthew Lister and John Cooper have*
“ *agreed with Joseph Buxton for the pur-*

^b Sir *Joseph Jekyll* did, in *Cud v. Rutter*, 1 P. W. 570. decree a specific performance in the case of a *chattel*, but Lord *Macclesfield* reversed it, and it has been the rule of the Court ever since, not to retain such a bill.

^c 3 Atk. 383, 384.

“ *chafe*

“chafe of all those several large parcels of
“wood, consisting of oaks, ashes, elms, and
“asps, which are numbered, figured, and
“cyphered, standing and being within the
“township of *Kirkby*, for the sum of 3050*l.*
“to be paid at six several payments, every
“*Lady-day*, for the six following years; and
“*Lister* and *Cooper* to have eight years for
“disposing of the same; and that articles
“of agreement shall be drawn and perfected
“as soon as conveniently may be, with all
“the usual covenants therein to be inserted
“concerning the same.”

Lord Chancellor *Hardwicke* said, “The memorandum appeared not to be the final contract, but was to be completed by subsequent articles. I am doubtful, says he, whether at law the plaintiff would not have been told this was an incomplete agreement. But, suppose two partners should enter into an agreement as in the present case, to carry on a trade together, and that it should be specified in the memorandum, that articles should be drawn pursuant to it, and before they are drawn, one of the parties flies off, I shall be of opinion, upon a bill brought by the other in this Court, for a specific performance, that notwithstanding it is in relation

tion to a chattel interest, yet a specific performance ought to be decreed.”

Every agreement of this sort ought to be certain, fair and just in all it's parts, or this Court will not decree a specific performance.

To constitute a regular partnership there must be an *express* agreement, or contract between the parties, capable of being determined legally by it's expressive form ^d, for if no express agreement has been made by the partners concerning their shares of profit and loss; the loss must be equally borne, and the profits must be equally divided. But, if any particular agreement has been made, it must be observed; for it was never yet doubted, but that the covenant would be binding, if two persons should agree, that two shares of the profit and loss should belong to one partner, and that only the third part of both should belong to the other.

It is also a settled point ^e, that, if partners expressly mention their shares in one respect

^d Hertius's Discourse de Societate, tom. 3. Commentat.

^e Justin. de Societate, lib. 3. tit. 26.

only, either solely in regard to gain, or solely in regard to loss, their shares of that, which is omitted, shall be the same as of that which is mentioned.

In constituting regular partnership, due attention should be paid to the form and substance of the several covenants in the indentures of co-partnership, because upon such covenants all the future convenience at least, of the several partners must depend. But if there be no articles of co-partnership between two or more persons, who agree between themselves to take jointly the profits, and bear equally the loss, in any trade, still, each and all of them shall be liable as partners, with respect to strangers, or the world; and upon this plain principle, that such strangers or third persons give credit and trust to the general profits of the trade, and consequently to both, or all the persons, participating or concerned in it, as if they were partners.

In 1726 a partnership was carried on between Sir *Thomas Mackworth*, General *Stewart*, *Parry*, *Hind* and *Briggs*^f, for the making

^f Metcalf, and the Royal Exchange Assurance Company. Feb. 4th. Hil. Term, 1740. Barnard. 343.

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and manufacturing of brass and copper. In that same year *Parry* became a bankrupt, and *Sir Thomas Mackworth* bought his share in the partnership stock. In the same year *Sir Thomas Mackworth* made an assignment to *George Robinson* of the fourth part of this stock, in consideration of 100*l.* But it was sworn that *George* declared, that the intention of his taking this assignment was not to become a partner in this business, but only that the assignment should stand as a security for such sums of money as he should advance to *Sir Thomas*; and *Sir Thomas* swore, that the intention of this assignment was not, that *George* should become a partner, but that he made it him merely for the purpose of giving him a vote at the meeting of the partners, in order that the designs of *Sir Thomas* in carrying on the works of this partnership might be the better completed. And indeed 100*l.* did not seem to be near the value of a fourth part of this partnership stock.

In 1729 *Sir Thomas* went to *Paris*, and whilst he was there he received a letter from *George*, giving him an account of some success in this trade. *Sir Thomas* wrote him a letter in answer to it, giving him some directions in what manner he would have the works carried

ed on; and there he mentioned this expression, *A profit to ourselves*, alluding to no other person in the letter but to himself and *George*.

On the 25th of *May* 1730 an agreement was entered into by *George* with Sir *Thomas* to the following effect; "I do promise to be
" accountable to Sir *Thomas Mackworth* in
" profit and risque, for a half in the under-
" taking of carrying on certain copper works;
" such profit and risque to be computed from
" the 25th of *March* last past; and I do agree
" to take such half part of the stock as the
" same has been estimated by the servants of
" Sir *Thomas Mackworth*. Signed *George*
" *Robinson*." At the bottom of this paper
writing there was another memorandum to
this effect; "Whereas *George Robinson* has
" signed an agreement to the purport before
" mentioned, I do hereby agree to the same.
" Signed *Thomas Mackworth*." After this
agreement was made, receipts were given,
wherein the names of Sir *Thomas* and *George*
were mentioned, and several sums were ad-
vanced by *George*, in order to carry on this
trade.

Afterwards in the same year Sir *Thomas*
made a purchase of some copper of *Paz* and
Bozalio,

Bozalio, and paid them the money for it himself. They swore, That they understood it, that he made this purchase of them on his own private account. However, the receipt that they gave him was for him and company. This copper was put into a warehouse belonging to Sir *Thomas*; and *John Robinson*, who was brother to *George*, and servant to Sir *Thomas*, went into *Scotland*: whilst he was there *George* got the key of the warehouse from *John*, and pledged this copper to the *Royal Exchange Assurance Company* for two thousand odd hundred pounds. The money due upon this pledge not being paid at the time agreed upon, the pledge was sold, and there remained in the hands of the *Royal Exchange Assurance Company* five hundred forty-five pounds, besides what satisfied their debt and charges.

About the year — 800*l*. South-Sea Annuities was bequeathed to *George* and *Ingram*, in trust for *Ann Stretfield*, for life, the remainder in trust for Sir *Thomas*. *Ann Stretfield* died.

In 1731 *George* became a bankrupt, and under that commission the assignees took the possession

possession of the copper-works before mentioned.

In 1732 Sir *Thomas* applied to the Court by petition, setting forth, "That for eight years before he had been solely possessed of those copper-works for his own benefit, and that *George* had no interest in them." Whereupon he prayed, that the Court would relieve him concerning the seizure before mentioned. Upon that petition affidavits of several witnesses were read, both on the part of Sir *Thomas*, and likewise on the part of the assignees.

The order which was made on that petition was, that an issue should be directed to try, whether Sir *Thomas* and *George* were partners in these works, or not. But that issue never was tried.

The present bill was brought by *Metcalf*, and others, the assignees under the commission, against the *Royal Exchange Assurance Company*, against Sir *Thomas*, *George*, and *Ingram*, praying, that an account might be taken between the assignees and Sir *Thomas*, and that the 545 *l.* might be paid to the plaintiffs, or at least placed to the partnership ac-

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count, and that the plaintiffs might be allowed to retain the benefit of the 800*l.* *South-Sea* annuities, in case Sir *Thomas* should appear to be indebted to them on the balance of the account. Sir *Thomas* in his answer to this bill swore, amongst other things, that he could not set forth whether there was a partnership between him and *George*, or not; the question relating to that matter arising from the construction of certain instruments in writing.

There was another bill brought by Sir *Thomas* against the *Royal Exchange Assurance Company*, and the persons whom they sold the copper to was made by them in an unfair manner, and praying relief upon this account.

Lord Chancellor said, That there were two questions proper for consideration; 1st, whether Sir *Thomas Mackworth* and *George Robinson* were partners? And 2^{dly}, supposing they were partners, what share in the trade they were each of them to be considered to have? With regard to the first of these questions; his Lordship said it was extremely plain, that they were partners. Whether they were so from the year 1726, is not so clear. But that they were so from the year 1731, to the time
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of the bankruptcy of *George*, is plain and manifest. The agreement which was entered into between them in 1731, bears date the 25th of *May* in that same year. The purport of the agreement is, “ *I do promise to be accountable to Sir Thomas Mackworth in profit and risque for a half in the undertaking of and carrying on certain copper-works, such profit and risque to be computed from the 25th of March last past. And I do agree to take such half part of the stock as the same has been estimated by the servants of Sir Thomas Mackworth.* Signed *George Robinson.*”

At the bottom of this paper-writing, there was another memorandum to this effect: “ *Whereas George Robinson has signed an agreement to the purport before mentioned, I do hereby agree to the same.* Signed *Thomas Mackworth.*”

This paper-writing purports, that *Sir Thomas* and *George* were to be partners in moieties. And after this writing was signed, it appears that receipts were given, wherein the names of *Sir Thomas* and *George* were mentioned; and several sums appeared to have been advanced by *George*, in order to carry on his trade. After this writing was signed, *George* made a pledge of the copper in ques-

tion to the *Royal Exchange Assurance Company* for 2700*l.* and that transaction shews likewise that he acted in the trade as a partner. Nor does Sir *Thomas* take upon himself by his answer, to deny that he was a partner. His being a partner, or not, was a matter of fact which Sir *Thomas* could not but know. But instead of answering to the fact, he chooses to say in this manner, “ That he could not set forth, whether there was a partnership between him and *George*, or not, the question relating to that matter arising from the construction of certain instruments in writing.” The next question is, what share in the trade they were each of them to be considered to have? And his Lordship’s opinion was, they were each of them intitled to a moiety. The natural import of the agreement which was entered into in *May 1731* shews this. It is a mutual agreement between Sir *Thomas* and *George* to become partners in moieties, and consequently it is an admission under the hand of Sir *Thomas* that he had a power to let *George* into a moiety of this trade. How the other partners went out does not appear, but it is pretty plain that there was some alteration in the interest of the partners, which occasioned this new agreement between Sir *Thomas* and *George*. After
this,

this, receipts were given in both their names ; if the other persons had continued partners at this time, their names would have been made use of in the receipts, as well as the names of these persons, or else the receipts would have been given generally on the behalf of one of them and company. And what makes an end of this matter is the petition of Sir *Thomas* in 1732. By that petition he expressly sets forth that *George* and he were partners, and that they had been so for eight years together. However it has been urged that this is not so clear a point, but that it ought to be tried in an issue, especially as there has been an order already made for that purpose. But his Lordship's opinion was, that there was no occasion to direct an issue about it. He said, upon the evidence laid before him he had no doubt concerning it. The matter now appears more plain than it did in the year 1732. That order appears to have been made merely on reading certain affidavits ; but now exhibits are produced, which makes the matter more clear. The consequence is, that upon the original bill the 545 *l.* must be directed to be brought into the partnership account ; but as to the 800 *l. South-Sea annuities*, there is no ground to allow the plaintiffs to retain any benefit of that, that being a mat-

ter in its own nature not proper for such a retainer; for which reason that part of the bill must be dismissed, but without costs. With regard to the other bill there is no foundation for that, there being no proof made, that the sale was in an unfair manner; that bill therefore must be dismissed with costs. And so his Lordship was pleased to decree accordingly.

But, at the same time, in order to constitute a partnership, and to make a person liable as a partner, Lord *Mansfield* held, in the case of *Hoare* and others against *Dawes* and another^g, that there must be an agreement between him and the ostensible person to *share in all risques of profit or loss*, or he must have permitted the other to use his credit, and to hold him out as jointly liable with himself.

This was an action for money lent; and after a verdict found for the plaintiff, a rule for a new trial was obtained, and the facts appeared to be as follows: That the plaintiffs, who were bankers, had advanced a sum of money on certain tea-warrants of the *East-India Company* to *Contenier* a broker, who deposited the tea-warrants with the plaintiffs

as a security, and also gave them his note of hand for the sum advanced. He had been employed by a number of persons, of whom the defendants were two, to purchase a lot of tea at the *East-India* Company's sale, of which they, (together with himself), were to have separate shares, the lots being in general, too large for any one dealer. The practice at such sales is, for the Company to give a warrant, or warrants, to the broker or purchaser, for the delivery of the quantity of tea purchased, on payment being made. At the time of the sale, 25 *l. per cent.* is advanced, and is forfeited, unless the whole is paid on the *third*, which is the *last*, day of payment. If paid sooner, allowance is made for prompt payment. The warrants are often pledged, and money raised upon them; generally considerably less than the supposed value of the tea. It happened however, in this instance, between the time of the deposit of the warrants with the plaintiffs, and the time when the payment was to be made at the *India* House, that the value of the tea sunk so much as to be considerably under the amount of the sum advanced. The broker, in the mean time, had become a bankrupt, and had informed the plaintiffs who his employers were, all of whom, except the defendants, were

since either dead, or become bankrupts. The shares of the defendants were to be two sixteenths of the whole lot. The ground of the action was, that all the employers of the broker were to be considered as partners, and jointly and severally liable for the whole. The defendants owed nothing upon their own two sixteenths. There was not any joint concern in the re-disposal of the tea. The defendant produced several bankers and brokers, (of whom *Contenier* was one) who said they had had frequent transactions of this sort, (it being a very usual speculation) and they always understood, that the only security was the pledge, and the personal security of the broker, unless where the principles were enquired after, and declared, which was very rarely done. That, as the practice was to advance considerably under the supposed value of the tea, and it was also usual to stipulate, that, if the money was not re-paid within a certain time, the lender might sell, the warrant was of itself a general and sufficient security. *Contenier* said that tea-warrants were considered as cash, and passed by delivery. On the other side, *in answer to this evidence*, (the plaintiffs having, *at first*, rested their case on the fact, that there were persons behind the curtain, for whom the broker acted), two witnesses

witnesses were called. One of them, one *Cartony*, a tea-dealer, swore, that a broker had once borrowed some money *for him* on tea-warrants, from the plaintiffs, and that the value of the tea having fallen under the sum advanced, and the broker having failed, he had paid the difference, considering himself as liable. The other was a person who had also dealt in tea, and in loans of this sort, and he swore, that his idea had always been, that the persons behind the curtain were liable; but, upon cross-examination he said, he never knew any loss happen, nor any demand actually made, on the brokers employers.

Lord *Mansfield*.—I considered this, at first, as a case of dormant partners. The law with respect to them is not disputed, *viz.* that they are liable when discovered, because they would otherwise receive usurious interest without any risk; but, towards the end of the cause, the nature of the transaction, and of these loans, was more clearly explained, and I was satisfied with the verdict, and am now confirmed in my opinion. The evidence of *Cartony* is irrelevant, because he said the broker borrowed the money *for him*; and besides he did not dispute the demand. Is this a part—

a partnership between the buyers? I think it is not, but merely an undertaking with the broker by each, for a particular quantity. There is no undertaking by one to advance money for another, nor any agreement to share with one another in the profit or loss. The broker undertakes to buy and sell, but makes no advance without the security of the tea-warrants, which are considered as cash, and pass by delivery, like *East-India* bonds. These warrants are pawned with the lender, but the broker has no power to pledge the personal security of the principals. He cannot sell the warrants, and borrow more money on such personal security. It makes no difference, whether specific tea, or the warrants, are delivered at the sale. It would be most dangerous, if the credit of a person, who engages for a fortieth part, for instance, should be considered as bound for all the other thirty-nine parts. *Non hæc in fœdera veni.* The witnesses did not merely speak to opinion, but to matter of fact, and their own dealings. They said, the money was lent to the broker alone. Sometimes, indeed, lenders have required to know the principals; *they* did not trust the broker alone; but all others who do not ask after the principals do. The note is given as a
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collateral security personally by the holder of the warrant, not in the character of a partner with other persons, nor as a broker for them.

Willes and *Ashhurst* Justices, of the same opinion.

Buller Justice.—This is a very plain case. The plaintiffs had no reason to consider the broker as a partner with the other persons, for though he had a share, he did not act or appear as a partner, nor were they partners as among themselves. They had never met or contracted together as partners. If this transaction were sufficient to constitute a partnership, a broker would have it in his power to make 500 persons partners, who had never seen nor heard of one another, or might at his pleasure, convert his principals into partners, or not, without any authority from them, by taking joint or separate warrants ^h.

The rule discharged.

^h In this case the plaintiff had first filed a bill in equity, which was dismissed with costs, the Lord Chancellor being of opinion, that it was merely a question of law.

And

And if money be lent to a trader by a partner who retires from business, at legal interest, with an additional annuity for a certain term of years, it is not to be considered a continuance of the partnership; for, under such circumstances, it was held, in the case of *Grace v. Smith*ⁱ, to be essential to make a person subject as a partner, that *he* is interested in the profits; that is, that the *advantages* which he derives from the trade are *casual*, as depending on those profits; for if they are certain and *defined*, he is not a partner, as here, where the defendant had been partner with one *Robinson*, but the partnership being dissolved, the defendant agreed to let a sum of 4000*l.* remain in *Robinson's* hands at *legal interest* for seven years, and to receive besides an annuity of 300*l.* per annum. for the same time; all of which was secured by *Robinson's* bond. It was held that this should not make the defendant a partner, and subject to *Robinson's* contracts; for he had no concern with the business, and the annuity and interest was *certain and independent of the profits*.

But in *Bloxam v. Pell*, Sittings Hil. term 1775, and which is cited in *Black. Rep.* 999.

ⁱ 2 Black. Rep. 998.

where

where the defendant had been partner with one *Brooke*, and they agreed to separate, and *Brooke* agreed to give him his bond for 2485*l.* with interest, which sum had been brought by the defendant into trade, and an annuity of 200*l.* for seven years, if *Brooke* so long lived, as in lieu of the profits of the trade; and the defendant had at all times liberty to inspect *Brooke's* books.

The defendant was adjudged to be a partner and liable; for the charge had reference to the profits, it was *casual* as depending on *Brooke's* life, and his right to inspect the books was that of a partner.

So that the true *criterion* seems to be, the *interest of the party in the profits*, and it also appears to be necessary, in order to charge a person as partner on the ground of sharing in profit and loss, to shew they were concerned not only in the joint purchase, but in the *joint sale*; that is, that their interest should continue joint till the time of the sale, when the profit and loss would be ascertained. A man entering into an agreement and afterwards subdividing his beneficial interest under it, among others, is alone liable to the performance, and the sub-contract
does

does not constitute a partnership. Thus in *Coope v. Eyre*^k, where an action was brought by the plaintiffs, who were the owners of a *Greenland* ship, against the defendants, upon an agreement to purchase a cargo of oil. The declaration stated, that on the 29th of *August* 1786, the plaintiffs sold the cargo to the defendants, at the rate of 20*l.* *per* ton, to be received as soon as it was boiled and ready. That by way of collateral security, two bills of exchange were deposited in the hands of the plaintiffs, one of which was accepted by the defendants *Eyre, Atkinson* and *Walton*. That the sale being so made, and it being expected that the defendants would not take away the oil pursuant to the terms of the sale, it was afterwards agreed between the plaintiffs and defendants, by the name of *Benjamin Eyre* and Co. that the plaintiffs should keep the oil in their possession, till the 1st of *January* following; and if the defendants did not pay for it on or before that day, the plaintiffs were to be at liberty to authorise the broker to re-sell it at the best price he could get; and if upon such re-sale, the oil should not produce 20*l.* *per* ton, with all charges, the plaintiffs were to deduct the

^k H. Black. Rep. 37.

difference of the price, out of the bills placed in their hands as a collateral security. The declaration then stated, that the defendants neither paid for the oil, or took it away, and therefore the plaintiffs authorised the broker to re-sell it. That the deficiencies upon the re-sale amounted to 400 *l.* besides brokerage, &c. 100 *l.* and that the bill of exchange accepted by the defendants was presented to them for payment, and refused. Before this action was brought, *Eyre* and Co. had become bankrupts. It appeared in evidence on the trial, that on the 24th of *August*, 1786, the defendants, *Eyre* for himself and partners, who were *Atkinson* and *Walton*, general merchants, *Hatterfley* for himself and *Stephens*, who were oil-merchants, and *Pugh* for himself and son, who were also oil-merchants, agreed to purchase jointly as much oil as they could procure, on a prospect that the price of that commodity would rise; that *Eyre* should be the ostensible buyer, and the others share in his purchase, at the same price which he might give. *Hatterfley* and Co. were to have one fourth; *Pugh* one fourth, and *Eyre* and Co. the remaining moiety. That they bought large quantities of oil, belonging to other ships, and other traders, besides the plaintiffs, in the name of *Eyre* and Co. That *Hatterfley* and *Pugh* occasionally

casionally came forwards, and gave directions as to the delivery of the oils, and otherwise interfered in the transaction; and also made many declarations, that they were all jointly interested in the different purchases, and that there was a general concern between them. On the part of the defendants it was insisted, that the contract of sale was made between the plaintiffs and *Eyre and Co.* only; and that the agreement entered into between themselves, was only a sub-contract, and did not constitute a partnership; and the learned Judge who tried the cause being of the same opinion, directed a verdict to be found for the defendants, which was accordingly done. The plaintiffs therefore moved the Court for a new trial, on the ground of mis-direction; and after the case had been fully argued, the Court refused to grant a new trial, being of opinion, that the verdict was proper. For as this was an action on a contract of sale, the vendor can have no remedy against any person with whom he has not contracted, unless there be a partnership, in which case all the partners are liable as one individual. It was justly observed, that a secret partnership can be no consideration to the vendor, though for reasons of policy and general expedience, the law is positive with respect to the secret partner,

partner, that when discovered he shall be liable to the whole extent. In many parts of *Europe* limited partnerships are allowed, provided they be entered on a register; but the law of *England* is otherwise, the rule being, that if a partner shares in advantages, he also shares in all disadvantages. In order to constitute a partnership, a communion of profit and loss is essential: and the shares must be joint, though it is not necessary that they should be equal. If the parties be jointly concerned in the purchase, they must also be jointly concerned in the future sale; otherwise they are not partners. In the present case *Eyre* was a mere speculator, and the other defendants were to share in the purchase, but were not jointly interested in any subsequent disposition of the property. Though they may by other purchases have concluded themselves as to some particular vendors, yet in the transaction in question there was not that communion between them, which is necessary to make them partners; their agreement was a sub-contract, which may be executory; as it was to share in a purchase to be made. The feller looked to no other security than *Eyre* and Co. To them the credit was given, and they only were liable¹.

¹ H. Blac. 37.

In an *implied* partnership, there should be a moral power, at least, in each individual, of performing what is undertaken on behalf of the whole; and since the very *basis* upon which such a partnership must be founded, is the principle of mutual justice, so must also the advantages, or disadvantages arising from such implied agreements between the parties, be determinable alone according to the rules of equity, and not subject to the express forms of law. Nevertheless the customs of merchants in this country, are universally adhered to on deciding upon differences between partners of this description; because those very customs aim at the prevention of wrong, and are themselves founded upon the very same principles of universal equity.

According to the custom of *England*, if two joint merchants occupy their stock, goods and merchandize in common, to their common profit, one of them naming himself a merchant, shall have an account against the other, naming him a merchant; and shall charge him as *receptor denariorum*, &c. m. that is, as receiver of the money of him *B.* from whatever cause and contract it shall redound to the common profit of them *A.* and *B.* n, as

m Co. Litt. 172. lib. Intrat. 17, 18, 19.

* F. N. B. 117. D.

may be made appear by *Lex Mercatoria*, 10
H. 7. 16. a.

In an action upon the case^o against *A.* the plaintiff declares upon the custom between merchants, &c. that if two merchants are found in arrears upon account, and they promise to pay it at certain days, that any or either of them may be charged singly; and then shewed the account, that *A.* and *B.* were found in arrears so much, &c. and promised to pay it at certain days, but did not, and the plaintiff brought his action against *A.* only, and resolved that it lay.

If two joint merchants make *B.* their factor, and one dies, leaving an executor, this executor and the survivor cannot join in an action against the factor *P.*; for though the duty does not survive, yet the remedy does; and therefore on recovery, he must be accountable to the executor for that *q.*

Nor can an executor and the surviving merchant be jointly sued, because the first is

^o 2 Roll's Abr. 702, 703.

^p 2 Salk. 444.

^q Martin v. Crompe, 1 Ld. Raym. 340.

to be charged *de bonis testatoris*, and the other *de bonis propriis* ^r.

In an implied partnership, by the custom of *England*, one of two joint-traders accepts a bill ^f, drawn on both for him and partner, it binds both if it concerns the trade; but otherwise, if it concerns the acceptor only in a distinct interest and respect.

But, ^t if a factor of an incorporated Company draw a bill on such Company, and any member accept it, the acceptance shall not bind the Company, nor any other member of it, because it is a private act of the party, and not a public act of the Company.

On the same principle, if ten merchants, each in his *individual* capacity, employ one factor, and he draw a bill on all of them, and one accept it, this shall bind him and not

^r Carth. 170, 171. 2 Lev. 228. 3 Lev. 290.

^s Pinkney v. Hall, 1 Salk. 126. Gilb. L. E. 117, 118. Kyd, 19.

^t Winch. 24, 25. Styl. 370. Moll. b. 2. c. 10. f. 18, 19. 29. Ld. Raym. 175. Salk. 126. 2 Salk. 442. 3 Bac. Abr. 611. 5 Mod. 398. 12 Mod. 345. Hard. 435. Vent. 152. Lev. 198.

the rest, because they are separate in interest, the one from the other.

Whether a corporation, which has not a special power expressly given for the purpose, can be concerned in drawing, or accepting a bill of exchange or promissory note, or in the negotiation of either, or can be made the payee, is a question which seems never to have had the consideration of a Court; perhaps, because nobody has ever entertained a doubt on this head ^u. And it seems to have been taken for granted by the Legislature ^x and it is consistent with the general principles of law, that, by the intervention of an agent or servant lawfully authorised, a corporation, on which no restraint is imposed in its original constitution, might in this respect act as a natural person. There is, however, a *proviso in this Act*, that no body politic or corporate shall have power, by virtue of it, to issue or give out notes, by themselves or their servants, other than such as they might have issued, if this Act had not been made.

The bank of *England* has a special power conferred on it for this purpose ^y.

^u Vide *Edie v. East India Company*, 2 Burr. 1216.

^x 3 & 4 Ann. c. 9.

^y 5 W. & M. c. 20. s. 28.

Where a bill or note is drawn in favour of two or more, in partnership with one another, an indorsement by one will bind both, if the instrument concern their joint-trade: so^z, where it is in favour of them, *or* either of them, an indorsement by one is a sufficient transfer, though they be not in partnership.

So, where a bill drawn by two is made payable to them or their order, it would seem from principle, that either might transfer without the other; for when two persons join in the same bill, *they hold themselves out to the world as partners, and, for that purpose are to be treated as such.*^a

^z Kyd 68.

^a Doug. 63d.

CHAPTER III.

Partnership—

DIFFERENT KINDS.

AS the proper object of partnership is to facilitate the undertaking, work, trade, or commerce for which the partnership is contracted: and to secure to every one of the partners out of the share which he has contributed, in conjunction with his co-partners, such profits and advantages as none of them could be able to make by themselves; it may be fit to enquire what are the different kinds of partnerships which tend to produce such effects? And under that description are classed those partnerships which demand the united labor, industry, care, credit, money, and other assistance of several persons for the purpose of increasing trade and commerce, either foreign or domestic, and thereby rendering the science of commerce more beneficial to the services of the state, and profitable as well as honourable to the merchants and traders themselves.

It is common for persons to enter either into a general partnership or society of *all*
E 4
their

their goods^a, or into a particular partnership which regards only some single species of commerce; and the stock and effects which are put into the partnership, become common to all the partners, altho' they are not delivered, (after an agreement executed between the parties) and altho' they remain in the possession of that partner who was the owner of them before the partnership was contracted. For, (by construction of law) the intention of the partners to communicate the goods, according to agreement, makes a *tacit* delivery of them, and each of the partners possesses for all the others, that which belongs to them in common, which is in his custody; each of them being possessed *per my et per tout*.

The king by his charter may constitute fraternities, or companies, for the management of foreign or domestic trade^b.

For trade cannot be maintained or increased without order and government^c; and therefore, the king may erect *gildam mercato-*

^a κοινωνία, i. e. Communion, Just. de Societate, lib. 3. tit. 26.

^b Com. Dig. Trade, (B)

^c Com. Dig. Trade, (D.)

nam, a fraternity or incorporation of merchants, for the advantage of trade ^d.

And none but the king can erect a society for trade, or public trading company ^e.

But the king by his charter cannot make a total restraint of trade, for such a patent would be void ^f,

None of the public trading companies incorporated by royal charter in this country for the purpose of trade, are to be considered as partnerships, within any of the legal principles applicable to partnerships formed by the voluntary agreement of individuals. For in such chartered companies where a trade is to be carried on under the corporate name in joint stock (as is the case with the *East-India Company*, &c.) there are express provisions that the members are not liable, on account of the joint trade, in their individual capacities; nor one of them for the debts or engagements contracted by others; but only for their respective shares or interest in the joint stock, and that upon trade, and

^d 8 Co. 125. a.

^e Skinner 224.

^f 3 Mod 132.

contracts carried on, or made in the corporate character of such chartered bodies.

Therefore if one or more persons enter into such a society, and become sharers of the property and joint stock, yet such a joining together does not constitute partnership according to the custom of merchants, nor within the principles of law established respecting joint traders.

Partnership, which, in *arithmetic* is denominated *Fellowship*, or the mode of adjusting partnership accounts and profits, is a rule of great use in balancing accounts amongst merchants, and owners of ships; where a number of persons putting together a general stock, it is required to give every one his proportional share of loss, or gain.

The *golden rule* several times repeated, is the basis of *fellowship*, and fully answers all questions of that kind: for as the whole stock is to the total thereby gained, or lost; so each man's particular share is to his proper share of loss or gain. Wherefore, the several sums of money of every partner are to be gathered into one sum, for the first term; the common gain, or loss, for the second; and

and every man's particular share for the third; and the *rule of three* is then to be wrought so many times as there are partners.

There are two cases of this rule in arithmetic, the one *without*, the other *with time*.

Fellowship *without time*, is where the quantity of stock, contributed by each person is alone considered; without any particular regard to the length of time that any of their monies were employed. For example: *A. B. and C. freight a ship with 212 tons of wine; A. laying out 1342*l.* B. 1178*l.* and C. 630*l.* towards the same; the whole cargo is sold at 32*l.* per ton. Q. What shall each person receive?*

Find the whole produce of the wine by multiplying 212 by 32, which yields 6784. Then, adding together the several stocks, 1342, 1178, and 630, which makes 3150, the work will stand thus:

$$\begin{array}{rcl}
 3150 : 6784 & \left\{ \begin{array}{l} 1342 - \text{Answ. } 2890, 1993, \text{ £}c. \\ 1178 \text{ ————— } -2537, 0006, \text{ £}c. \\ 630 \text{ ————— } -1356, 8. \end{array} \right. \\
 \text{Proof } 3150 & & 6784.
 \end{array}$$

Fellow-

Fellowship *with time*, is where the time wherein the money, &c. were employed, enters into the account. As for example, *viz.* *A. B. C.* commence a partnership the first of *January*, for a year. *A.* the same day disbursed 100*l.* whereof he received back again, on the first of *April*, 20*l.* *B.* pays, on the first of *March*, 60*l.* and more, the first of *August* 100*l.* *C.* pays, the first of *July*, 140*l.* and, the first of *October*, withdraws 40*l.* At the year's end their clear gain is 142*l.* Qu. What is each partner's due g? *A.*'s 100*l.* multiplied by three months, the time it was in, makes 300*l.* and the remaining 80, by nine months - 720, in all 1020*l.* of *A.*'s contribution. For *B.* 60, into 10, gives 600; and 100 into 5, 500; in all 1100*l.* for *B.* For *C.* 140 into 3, gives 420; and 100 into 3, is 300; in all 720*l.* for *C.* Now, $1020 + 1100 + 720 = 2840$ for the common antecedent, and the gain 142, is for the general consequent; the rule will stand thus:

2840 ; 142	{	1020 1100 720	Ans. 51 55 36 <hr style="width: 50px; margin: 0;"/> 142
Proof 2840			

g N. B. All the particular times (if not so given) must be reduced into one denomination, *viz.* into years, months, weeks, or days.

By

By the *Roman* Law, the social contract, or partnership, needed no other solemnity, but the sole consent of parties, without any writing at all.

The *French* distinguished three kinds of mercantile *society*; *ordinary society*, called also *collective* and *general*; *society in commendam* or *commandity*; and *anonymous society*, called also *momentary* and *inconnue*.

The first was where several merchants acted alike in the affairs of the *society*, and did all under their collective names, which were public, and known to every body.

Society in *commendam*, &c. was that between two persons, one of whom only put his money into stock, without doing any other office of a copartner; the other, who was called the *complementary* of the *society*, dispatching all the business under his own name. This *society* was very useful to the state; inasmuch as all kinds of persons, even nobles, and professional men, might contract it, and thus make their money of service to the public; and those who had no fortune of their own to trade withal, hereby found means of establishing themselves in the world, and of making

making their industry and address serviceable.

Anonymous society was *that* where all the members were employed, each particularly, in the common interest, and each was accountable for profits, &c. to the rest; but without the public's being informed thereof; so that the seller had only an action against the particular buyer, no other name appearing.

It was also called *momentary*, because frequently made on particular occasions, and ceasing with them: as in the making a purchase, the selling any commodity, &c.

Of this they distinguished four kinds: *society by participation*, which was usually formed by letters from one city to another, where a merchandize was to be bought or sold. The second was, when two or three persons went together to fairs to buy goods. The third, when two or three persons agreed to buy up the whole of some commodity, in any country, to sell it again at their own price. And the fourth was, when three or four persons made a journey together, to buy and sell the same commodity. Besides merchants, people

ple of quality, &c. were admitted into these *anonymous societies*.

Although partnership, or fellowship, and company, or society, according to the civil law writers, mean much the same thing; yet the custom of *England* has made a difference between them; partnership, being understood of two or three dealers, or not many more; and *company* usually of a greater number; such are the fraternities of the several professions and trades incorporated within the city of *London*. So also the *East-India* Company, or other like corporations, which cannot be established without the concession of the Sovereign, by letters patent, charters, &c. Whereas in partnership, the bare consent of the partners, fixed and certified by acts or contracts, is wholly sufficient; which acts or contracts are made for the reciprocal advantage of all who engage therein, and in which such care is necessarily exacted from each partner, as every prudent man commonly takes of his own concerns in life; consequently each partner should be answerable for wilful neglect in the joint trade or commerce so engaged in for their mutual benefit.

Partnerships in trade differ from one another according to the degrees of interest, and the intention of the persons who join in them; and they are, either, where all the partners appear ostensibly, or, where some of them are dormant; with a view to consider the nature of such partnerships, I shall proceed to class the different kinds as they seem to occur in the ordinary course of mutual dealings and transactions in trade.

And such partnerships in trade may be classed under two heads, namely, *general*, and *special*.

First, *general*, for the ordinary purposes of carrying on trade.

Secondly, *special*, for a particular concern, or in a single dealing or transaction, as part-owners of ships, and for a single voyage under a charter-party of affreightment, or otherwise.

CHAPTER IV.

Partnership—
general.

ACCORDING to the tenor of the *civil* law, it would seem that a *general* partnership included in it every thing that might belong to the partners, either *real* or *personal*, or which they might acquire by any lawful cause whatsoever. But, in order to pursue the plan prescribed in the foregoing chapter, it may be sufficient for me to consider the nature of a general partnership, as far as it applies to the ordinary course of mutual dealings and transactions in trade, which respects only *personal chattels*, and is regulated by the *law merchant* as established in equity, and confirmed by common law.

Where two or more merchants agree to join together in any way for the purpose of carrying on trade, they are said to be in company, and must be considered partners. And by the law merchant, which is part of the law of *England*^a, they are recognized and

^a Co. Lit. 11. b. 2 Roll. Abr. 114.

treated as partners, whether there was an *express* agreement entered into by the parties or not, provided they appear ostensibly to the world as joint-traders.

In such a *general* partnership, where an individual merchant deals with either of them, he goes upon the *credit of the whole*^b, considering the act of one, in a joint concern, as the act of the whole copartnership firm, throughout the ordinary course of general trade.

So in the case of — v. *Layfield*^c, where there are several partners, and a man *goes up on the credit of all*, the act of one shall be presumed the act of all, and is evidence against the rest, to bind the whole, unless either of them can shew a disclaimer, or refusal to be concerned. In this case *Layfield* and the other defendants were bankers, and *Layfield* sold a lottery ticket in the *double exchange* lottery (in which several bankers were trustees) to the plaintiff, and undertook to pay the prize arising from it, the other partners were held to be liable, no disclaimer appear-

^b 3 Bac. Abr. 590.

^c Nisi Prius, per Holt, Ch. J. 1 Salk. 292.

ing; for the lottery having been conducted by bankers, the plaintiff appeared to be well grounded in looking to the joint-credit of *Layfield's* partners. But, notwithstanding, where the person bringing the action has looked to the faith of several partners, who are in business together, and has relied upon their joint-credit, though but one only of the partners acted, the proof of the act of one shall charge them all; yet it must be made out in an action at *common law*^d, that such debt or contract was joint, before the other partners shall be charged.

“ For in *assumpsit* against several, a joint debt or contract must be proved; otherwise the proof would not correspond with the declaration.” Yet Courts of *Equity* have governed themselves by more general rules, as to the mode of proof.

And here occurs that most excellent definition of the mode of *proof*, as laid down by Mr. Justice *Blackstone*^e, in his chapter of proceedings in the Courts of *Equity*. “ And, first as to the mode of *proof*. When facts,

^d Buller, N. P. 129.

^e Black. Com. vol. 3. p. 437.

“ or their leading circumstances, rest only in
 “ the knowledge of the party, a Court of
 “ Equity applies itself to his conscience, and
 “ purges him upon oath with regard to the
 “ truth of the transaction; and that being
 “ once discovered, the judgment is the same
 “ in equity as it would have been at law.
 “ But, for want of this discovery at law, the
 “ Courts of Equity have acquired a concur-
 “ rent jurisdiction with every other court in
 “ all matters of account. As incident to ac-
 “ counts, they take a concurrent cognizance
 “ of the administration of personal assets, con-
 “ sequently of debts, legacies, the distribu-
 “ tion of the residue, and the conduct of exe-
 “ cutors and administrators. As incident to
 “ accounts, they also take the concurrent ju-
 “ risdiction of tithes, and all questions relating
 “ thereto; of all dealings in partnership, and
 “ many other mercantile transactions.” So
 that partnerships are properly cognizable by
 Courts of Equity; and it is certainly for the
 advantage of trade, that mercantile transac-
 tions are not subject to be restrained by all
 the technical forms of law.

Thus in *Trin.* 1693, after much considera-
 tion, it seems to have been established in a
 case

case ^f where *A.* and *B.* were partners. *A.* borrowed money, and gave his note subscribed for self and company. There was no proof that the money was brought into stock, but the money was paid in the shop. *Per Cur.* The note of one partner (the money being paid in the shop) binds both, and though *at law* the note stands good only against the executor of the surviving partner, who was *A.* who received the money and signed the note, yet it is proper *in equity* to follow the estate in *B.* for satisfaction; and decreed accordingly. It appears that this case, after a dismissal by the Master of the Rolls, was heard on appeal, *Mich.* 1692. when no notice is taken of any mention to have been made of the circumstance of the money's being paid in the shop, and yet then ^h the Court declared they took it that both partners were bound.

And such may be considered the invariable practice of merchants in their dealings and transactions, where there is a general partnership to carry on trade. But, where two entered into *articles* of copartnership, each

^f 2 Vern. 292.

^g 16 Vin. Ab. 243.

^h See 2 Vern. 277.

brought in 1000*l.* stock. There was to be no benefit of survivorship, neither was to become indebted without the other, nor either to take out of the stock without the other. One became *indebted without the consent of his partner*, and made his wife executrix, and died. The wife *confessed judgment* for the debt. The other sues for an account and relief against the creditor and the wife. They confess the *articles*, and the obtaining judgment. Lord Chancellor granted an injunction against the judgment, because the debt related not to the partnership, saying, if this be suffered, no trade could be in such case *i*.

So where three persons entered into partnership in the trade of sugar-boiling, and agreed that no sugars should be bought without the consent of the majority *k*; one of them afterwards makes a protest that he would no longer be concerned in partnership with them. The two other persons after make a contract for sugars, the seller having notice that the third had disclaimed the partnership, he shall not be charged.

i Vin. Ab. 16. f. 242.

k Mumit v. Whitney, M. S. Tab. 14 June 1721.
Vin. Ab. 16, f. 244.

In a general partnership to carry on trade, the *sale* by one partner is the sale by all, and therefore though one sells the goods, or merchandiseth with them, yet action must be brought in all their names; and in such case the defendant shall not be received to wage his law, that the other partner did not sell the goods to him, as is supposed in the declaration. *Lambert's case*¹, *Hil. 11 Jac. C. B.* In a general partnership, payment to one of the partners is payment to all^m.

So, if they all, except him to whom the payment was made, were bankrupts, the payment is only unavoidable as to his proportionⁿ.

And if there be four partners, whereof three are bankrupts, and their shares assigned, and a payment is made to him that was no bankrupt, it is a payment to all the assignees; for now they are all partners^o.

¹ Godb. 244.

^m 12 Mod. 447.

ⁿ At Nisi Prius, cor. Holt Ch. J. Vin. Ab. v. 16. 245.

^o 12 Mod. 447.

If two be found in *arrearages of account* by the custom of merchants, one may be charged to pay all the debt as well as both p.

Among merchants it is looked upon as an allowance of an account current, if the merchant that receives it does not object against it in a second or third post; *per* Commissioner *Hutchins* in the case of *Sherman v. Sherman*, where there had been a general partnership, and some differences and disputes had arisen q.

If one partner borrows any money out of the general partnership trade, his own share shall be answerable for it, and shall not be permitted to come into equity and pray an account, without making a satisfaction for the debt r.

If there are two partners in trade s, and one buys goods for both, and the other dies, the survivor may be charged by *indebitatus assumpsit* generally, without taking notice of the

p Per. Roll. Ch. J. Sti. 243.

q 2 Vern. 276.

r Abr. Equ. Cases, 9 Trin. 1728.

s Hyatt v. Hare, Comb. 383.

partnership, or that the other is dead, and he survived.

Though there is no survivorship amongst merchants, † yet if two joint-merchants contract with a bailiff, the contract is entire and joint, and by the death of the one survives to the other. Now suppose a factor should bring his action for his wages, it must be with the survivor only u.

Sometimes indeed all the partners in trade do not appear ostensibly to the world, though they share in the profits and loss; and it is not unusual for gentlemen of large and independent fortunes to embark very considerable sums of money in trade; they being oftentimes ignorant of the *science* of commerce, and meaning to depend entirely upon the skill of merchants or traders with whom they engage, in a general partnership of all their stock and effects, yet not suffering their names to appear in the copartnership firm; but at the same time receiving a proportionate share of the profits arising out of their joint trade, bearing equally their risk of loss; and such

† Wynch. 52 arg.

u Per Holt Ch. J. Comb. 474.

are usually stiled *dormant* partners. And the law respecting such *dormant* partners Lord *Mansfield* was pleased to say, in the case of *Hoare v. Dawes*^v, is not disputed, viz. “that they are liable when discovered, because they would otherwise receive usurious interest without any risk.”

And it has also been determined that a *dormant* partner may be, without having served an apprenticeship to the particular trade, under the statute of *Eliz. w*; as in the case of *Raynard v. Chase*^x, wherein it was held that one not qualified to exercise a trade himself by having served an apprenticeship, entering into partnership with a qualified person, and only sharing the profits and standing the risks of the partnership, without ever interfering in the trade personally, is not within the statute 5 *Eliz. c. 4*.

This was an action of debt for a penalty on 5 *Eliz. c. 4*. for exercising *the trade of a brewer*, without having served an apprenticeship. In the declaration there were two counts. To the former “*nil debet*” was

^v Doug. 371.

^w 5 *Eliz. c. 4*.

^x 1 *Burr. 2*.

pleaded:

pleaded : and there was a general verdict for the defendant ; (*viz.* “ That the defendant does not owe, &c.”) But on the second count there was a special verdict, which was to the following effect, *viz.* that the defendant *Chase* and one *Coxe*, were, and have been during all the time charged in this count, as partners in the trade ; and that the trade was carried on, and has been for four years carried on, in their *joint* names : that *Coxe* did serve an apprenticeship, &c. but *Chase* never did ; and that *Coxe* is a *working brewer*, and was paid a salary for his labour ; which salary was always deducted, and allowed him, *previous* to a division of the profits ; and the entries at the Excise-office were in their *joint* names : but that the defendant *John Chase* never *exercised the trade himself*, (which was wholly managed and carried on by *Coxe*) but *only shared the profits and stood the risks* of the partnership : And they find it to be a trade within 5 *Eliz. c. 4.* Question on 5 *Eliz. c. 4. s. 31.* “ whether the defendant *John Chase* is within the act, upon this special finding ?”

Mr. *Moreton pro quer.*

This attempt to evade the force of the act by the scheme of a partnership *with a qualified*

fied trader, would entirely frustrate the *intention*, and is directly contrary to the *words* of the act.

The short of this case is, *Cbese* not being himself *qualified*, takes a partner *who is qualified*; which qualified partner is the only *acting* person in carrying on the trade and *Cbese* never interfered in it.

There was the like point before the Court in *P. 13 G. 2. B. R. Rex v. Driffield*.

But *per Denison* and *Foster* Justices, that case was never determined: it went off upon an objection to the jurisdiction.

Morton.—But the Lord Ch. J. *Lee* then said, “that he had never known a person
“exempted from the statute who had not
* served an apprenticeship.”

And as to his not interfering in the trade in the case of *Hobbs qui tam, &c. versus Young*, reported in 2 *Salk.* 610. and in *Carthew* 162. and in 3 *Mod.* 313. is a determination in point, and not to be distinguished from the present case.

3 Hil. 1 & 2 Will & M. Holt C. J. 66.

Therefore

Therefore he prayed judgment for the plaintiff.

Mr. Bishop *contra, pro defend'*, said, he would first consider how this matter stood *before the statute*, with regard to the free and unlimited right that every man naturally and legally had, of exercising whatever trade he pleased; secondly, the *constructions* that have been *favourably* made upon it *in extention* of the qualifications to exercise trade; and thirdly, distinguish this case from the cases cited.

And first, the liberty of trade is a natural and common-law right, and was long unrestrained. The statute of 37 E. 3. c. 5. which *first restrained* it, was very soon *repealed* by 38 Ed. III. c. 2. and Lord Coke in 4 Inst. 31. says, "That such acts of Parliament never live long." He cited the case in 2 Bulstr. 186. *Dominus Rex* and *Allen* plaintiffs against *Tooley* defendant, is an authority for him, though the Court did not formally pronounce any final judgment therein, and he also cited 11 Co. 53, the case of the Taylors of *Ipswich*. Secondly, the before mentioned case in 2 Bulstr. 186, *The King* and *Allen* v. *Tooley*, proves the construction to have been

favourable. *Jenk. Cent. case 15, p. 284.*
 “ A private brewer is not within the statute. *Keilwey 96. pl. 6,* proves the statute ought to be taken strictly, being penal, and in derogation of the common law. And Judges have dispensed with the rigour of it as in *Foth's case, 1 Salk. 67.* where seven years apprenticeship beyond sea, though without binding, was holden sufficient. So *Queen v. Maddox, 2 Salk. 613.* S. P. accordingly, and the Court there call this statute *5 Eliz.* a hard law, *Comberb. 254. Rex v. Goller, per Eyre Justice,* one brother living with another seven years (at the trade of a tallow chandler) though not bound, may set up the trade, *1 Mod. 26. pl. 69. Dominus Rex v. Tarnith,* proves too that this statute ought not to be extended further than necessity requires.

Now it is not found by the present special verdict, in the affirmative, “ That this man has occupied, used, and exercised the trade:” but it is found (on the contrary) negatively, “ That he has not *interfered* in it; but it was “ wholly carried on by *Coxe.*” And *Hob. 298,* says the rule is, “ That affirmatives in “ statutes that introduce new laws, imply a “ negative, &c.” However here is an *express* negative.

Thirdly,

Thirdly, with regard to the cases cited—
As to *Rex v. Driffield*, whatever was found in the affirmative in that case is found in the negative here. And as to the case of *Hobbs v. Young*, there was *no partner* skilful in the trade but only *servants*: whereas here is a skilful partner to conduct it; and the servants are employed to set to work by *this partner*, who is skilful; and are *not* employed and set on work *by* the defendant.

Then he added (fourthly) some arguments *ab inconvenienti*.

First, this will affect all great undertakings, for it seldom happens in such great undertakings that all the partners are duly qualified, in strictness. So likewise, it would affect all cases where *infants* and *trustees* are intitled to shares of profitable trades. So where *creditors* have shares in them.

And *apprenticeships* in great breweries are not in fact usual or customary.

Mr. *Morton*, in reply, premised, that the rule of construction upon this Act must be *uniform*, with regard to *all* the trades within it: and *breweries* cannot be distinguished from the rest.

In

In answer to Mr. *Bishop's* argument, he observed,

First, It is of no importance what was the right before the statute: the statute was made *expressly*, to restrain such right in future, for the good of the public.

Secondly, He said, he did not want to *extend* this law; this case is fully and completely *within* it without straining it at all. And the constructions that Mr. *Bishop* calls favourable, in the instances which he has cited, are no more than just and reasonable, upon the circumstances of the respective cases in which they were made.

Thirdly, As to the negative-*finding* in the present case, it amounts to no more than "that this man did *not mind his business*;" (which the other partner did). And as to setting to work, it is plain that *Coxe* is set to work by *Chase*: and *virtually* he sets all the servants to work. Indeed *Coxe* is here both a journeyman and a partner to *Chase*, for *Chase* pays him as a journeyman, and besides that gives him a share of the profits, and my Lord Ch. J. *Holt's* opinion in the case of *Hobbs* and *Young* is quite applicable to the present case.

Fourthly,

Fourthly. He endeavoured to shew that the construing this man to be within the penalty of the statute, could not be attended with any sort of inconvenience; therefore he prayed judgment for the plaintiff.

As this was the first argument, it was expected (as of course) that it would be argued again: but Lord *Mansfield* gave his opinion immediately, to the following effect:

Lord *Mansfield*.—Where we have no doubt we ought not to put the parties to the delay and expence of a farther argument; nor leave other persons who may be interested in the determination of a point so general, unnecessarily under the anxiety of suspense.

The defendant is to share the profits with *Coxe* in moieties, and is liable to the debts of the partnership: but it is *positively and expressly* found “that during all the time charged *he* never acted *in or* exercised the trade.” He was not, by the *terms* of his agreement, to act in the trade, the other partner was to do the whole, and had a particular salary on that account. It is not found that either *Coxe* or any servant under him was set to

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work

work *by Chase*, nor that *Chase* did *any act* whatever of exercising the trade, he was only concerned in the *profit*.

Now though this may be to some *purposes* exercising a trade in respect of third persons who deal with the partnership as *creditors* and within the meaning of the *statutes concerning bankrupts*, yet the present question is, “Whether it be exercising the trade contrary to this act?”

I think Mr. *Bishop* has laid his foundations right, against extending the penal prohibition beyond the express letter of the statute.

1st. This is a *penal law*.

2dly. It is a *restraint of natural right*. And

3dly. It is *contrary to the general right*; given by the *common law* of this kingdom.

I will add,

4thly. The policy upon which the Act was made, is from experience become doubtful.—Bad and unskilful workmen are rarely prosecuted.

This

This act was made early in the reign of Queen *Elizabeth*. Afterwards, when the great number of manufacturers who took refuge in *England* from the Duke of *Alva*'s persecution had brought trade and commerce with them, and enlarged our notions, the restraint introduced by this law was thought so *unfavourable*, that in 33 *Eliz.* in the Exchequer (4 *Leon.* 9 *Pl.* 39.) it was construed away; for it was holden clearly by the judges in that case, which construction however I take *not* to be law *now*, “ That if one hath
“ been an apprentice for seven years at *any*
“ one trade mentioned within the said statute,
“ he may exercise *any trade named in it*,
“ though he hath *not* been an apprentice
“ to it.”

All these observations only shew, “ That
“ this act, as to what enforces the *penalty* of
“ it, ought to be taken *strictly*,” and accordingly the constructions made by former judges have been favourable to the qualifications of the persons attacked for exercising the trade, even where they have not *actually* served apprenticeships. They have, by a liberal interpretation, *extended the qualifications* for exercising the trade *much beyond* the letter of the act; and have *confined the penalty and prohibition*

bition to cases *precisely within* the express letter. Let us consider whether the *present* case be within the *letter* or even the *meaning* of this act.

The *general policy* of the act was to have trades carried on by persons who had *skill* in them.

Now here the *personal* skill of the defendant makes no *real* difference in the case; for the person who is skilful, *acts every* thing, and *receives no directions* from this man; he neither did, nor was to interfere.

The case of *Hobbs* and *Young* is not parallel. There the defendant, a *single* man, directed the whole trade; was the *master*; and *directed* all the servants *as between master* and *servant*; no doubt it is the *master* who carries on the trade, and not *the servant*. But in *Hobbs* and *Young* there was *no partnership*; nor (what is the distinguishing character of the present case) *a mere naked* sharing of the profits, and *risqueing* a proportion of the loss; without his acting or directing at all, in any manner whatsoever.

In many considerable undertakings, it is absolutely necessary to take in persons as partners to share the profits and risque the loss. And the general usage and practice of mankind ought to have weight in determinations of this sort, affecting trade and commerce, and the manner of carrying them on. It is notorious that many partnerships are entered into, upon the foundation of one partner contributing industry and skill, and the other money. Many great breweries and other trades have been carried on for the benefit of infants and residuary legatees, under the direction of the Court of Chancery. Now if the plaintiff's construction was to hold, the whole direction and decree of the Court of Chancery was contrary to law, and to an express act of Parliament. So it is likewise practised in *other* great trades. The late Mr. *Child* directed his business of a *banker* to be carried on for the benefit of his children and other persons. Many other instances might be mentioned. It would introduce the utmost confusion in affairs of trade and commerce, if this construction should prevail. On the *other* hand, I see no inconvenience. It is exactly the same thing as to the trade in every *iota*, "whether this partner has or has not served an apprenticeship." Therefore

I think the defendant *not* liable to the *penalty* of 5th *Eliz.*

Mr. Justice *Denison* said that this was a new case. For though the cases of *Rex v. Driffield*, and *Adcock v. Gele*, were indeed before the Court, yet *no opinion* was delivered in either of those cases.

He concurred that it was *not* an *exercise* of trade *within 5 Eliz.* The true intent of that act was, that no man should *exercise* any of those trades, unless he had *skill* in them. It has never been extended by any liberal construction of it, in point of enforcing the *penalty*. And the present question is, “whether this man has *exercised* the trade, within the meaning of it, so as to be *liable to the penalty*?”

Now it is here found, “that he *never* did *interfere* in the trade *himself*.” In the case of *Hobbs v. Young*, the defendant was the superintender of the work, and *did exercise* the trade, without having any skill in it. *And this* is the *point in question*, and the principal determination in that case of *Hobbs v. Young*, whatever else might drop from the Judges in giving their opinion. But *here* the defendant

defendant *never meddles at all*, but leaves all the management to a partner who had skill; he himself *never acted* in carrying on the trade.

It may be said indeed, “that *Chase* is liable to the *statutes of bankrupts*.” True; but the constructions of *those* acts made for the benefit of the bankrupt’s creditors, is very different from the construction of this *prohibitory* and *penal* act; which ought to receive a *strict* construction in point of extending the *penalty*.

Therefore for these reasons, and those given by the Lord Chief Justice, he held, “that this was a *not exercising* the trade within the act.”

Mr. Justice *Foster* concurred; and said, he had prepared himself to give his reasons *at large*; but as the Lord Chief Justice had gone through them so fully, and enforced them in so clear and satisfactory a manner, he would only, *in general*, declare his concurrence.

Mr. Justice *Wilmot* was of the same opinion.

By the Court unanimously judgment was given for the defendant.

CHAPTER V.

Partnership—
Special.

IN this chapter I am to treat of *special* partnership, in contradistinction to such as is *general*. Throughout the common occurrences of trade and merchandize, partnership becomes special, from some peculiar circumstances which arise out of the nature of the contract, or the condition of the parties contracting, and it is usually contracted for a particular concern, or for a single dealing or transaction.

In many parts of *Europe*, confined and limited partnerships are contracted and allowed, provided the parties have such agreements entered on a register; and the risk of loss in such case is very frequently limited and confined to one side only, and usurious interest may consequently be received without incurring any risk: to remedy which supposed evil in this country, limited partnerships have been disallowed in our courts here; for in *England* the rule is said to be^a, that if a

^a H. Blac. 37.

partner shares in the advantages, he shall also share in all the disadvantages of the partnership concern.

This subject appears to have been discussed by writers upon the civil law, and a question hath arisen, If *A.* and *B.* should covenant between themselves that *A.* should receive two parts of the profit, and bear but a third of the loss, and that *B.* should bear two parts of the loss, and receive but a third share of the profit, whether such an agreement should be binding? Some have been of opinion, that such a covenant was contrary to the nature of partnership, and ought not therefore to be ratified; but, a different opinion seems to have prevailed, and for this reason, because the labour of some is so highly valuable, that it is but just, that they should be admitted into partnership upon the most advantageous conditions. Another opinion hath also obtained amongst them, namely, that a partner may by agreement take a share of the profit, and not be accountable for any part of the loss; and it is said that this might be done equitably: but then it must be so understood, that, if profit accrues from one species of things and loss from another, only what remains, after the loss is compensated, shall be looked

looked upon as profit. Yet, according to the construction of our laws at the present day, it appears to be the received opinion, that, in order to constitute a partnership, though ever so special in its nature, a communion of profit and loss is essential: and the shares must be joint, though it is not necessary that they should be equal ^b.

Partnership may be said to be *special*, when it is contracted for a particular concern or for a single dealing or transaction, as by part-owners of ships; and for a single voyage under a charter-party which is an agreement by indenture, whereby the owners, master and freighters of a ship covenant with each other, that such a ship shall be fit and ready to sail, take in such and such lading, carry and transport the same to such place or places, in consideration whereof the freighters or merchants are to pay so much, &c. and such charter-party being a covenant or agreement for that particular voyage, shall be construed according to the intention of the parties, and the usual custom of merchants ^c.

^b H. Black. 48.

^c 2 Vent. 196. Style 133. 2 Show. 384. Palm. 399. 2 Roll. Abr. 248. pl. 10. Pop. 161.

Special indentures of co-partnership are often executed by merchants, as part-owners of a ship^d; without which species of partnership, the commerce of this island must be trifling indeed; for it is by such means that we are enabled to embark in and carry on foreign trade, which renders us, rich, honourable, and great; that gives us a name and esteem in the world; that makes us masters of the treasures of other nations and countries, and begets and maintains our ships and seamen, the walls and bulwarks of our own island.

And this species of co-partnership is not constituted by executing of indentures solely, but part-owners of a ship may become so either by building or purchasing their vessels^e, and if the property is distributed among several, the major part of them may let the ship out to freight against the consent, though not without the privity of the minor^f.

Part-owners are tenants in common of a ship^g; and both by the common law of this

^d Vide Paul v. Birch, 2 Atk. 622.

^e Molloy 313. Beawes 53.

^f Trin. 9 Will. 3. 1 Ld. Raym. 235.

^g Molloy 309.

realm, and the maritime laws, it is provided, that in case a ship be taken away or the owners dispossessed, they may maintain an action of trover and conversion for an 8th, a 16th, or any other part or share of the same.

Thus, in an action on the case, the plaintiff declared that he was owner of the 16th part of a ship, and the defendant owner of another 16th part of the same ship, and that the defendant fraudulently and deceitfully carried the said ship *ad loca transmarina*, and disposed of her to his own use, by which the plaintiff lost his 16th part to his damage; and on Not Guilty pleaded, a verdict was found for the plaintiff, but it was afterwards moved in arrest of judgment, that the action did not lie, for tho' it be found deceptive, yet this did not help it, if the action did not lie on the subject matter; and here they are tenants in common of the ship, and by *Littleton*^h between tenants in common there is not any remedy, and there cannot be any fraud between them, because the law supposes a trust and confidence betwixt them i;

^h Litt. f. 323. i Inst. 199. b. 200. a.

ⁱ Saik. 290. S. P. Saik. 392.

and upon these reasons judgment was given
quod querens nil capiat per billam k.

Part-owners are not obliged by law to continue their paction or partnership without sundering; but yet if they will sunder, the *law marine* requires some considerations to be performed before they can do so. And therefore if the ship be newly built and never yet made a voyage, or is newly bought, she ought to be subject to one voyage upon the common out-read and hazard, before any of the owners shall be heard to sunder and discharge their parts^l; but by the laws of *England* the owners may, before any such voyage, sell or transmit their right.

Where thirty-seven part-owners of a ship would send her a voyage, but two or three of the other part-owners would not consent m. Upon which the Admiralty took stipulation in nature of recognizance of the thirty-seven for security for the safe bringing back of the ship. And the ship being lost, the two or three part-owners, who opposed the voyage libelled upon this stipulation against the thirty-

k Raym. 15. S. P. 1 Levinz 29. 1 Keeble 38. 3. Leon. 228.

1 Molloy de Jur. Mar. p. 310. f. 3.

m 1 Id. Raym. 235. Trin. Term 9 W. 3.

seven. Upon which they moved for a prohibition. But it was denied; for *per curiam*, though by the *law of England* two or three part-owners may hinder the others from sending the ship a voyage without their consent, yet the law of the Admiralty is otherwise. Because there, for the encouragement of navigation, the Court of Admiralty will permit the ship to make the voyage, upon security given to bring her back safe. For it is reasonable that the others, who oppose the voyage, should have some security for their ship. Then if the ship be lost, it is at the peril of the adventurers, and they shall be suable upon their stipulation by the others in the Admiralty court; since it is not doubted, but the Admiralty may take stipulations.

If one of several part-owners of a ship objects to a voyage the others propose making, he may by process out of the Admiralty arrest the ship, and compel the other part-owners to give security for her safe return. *Lambert v. Acree* n. Several part-owners of a ship. Some of them were desirous that the ship should go to sea, and others of them would

n 1 Lord Raym. 223. S. P. Str. 890. Fitzg. 197.
 i Willf. 101. Raym. 78. 1 Keb. 38. 1 Lev. 29.
 Litt. f. 323. Co. Litt. 200. a. S. P. Vin. Ab. 338.
 pl. 12.

not consent. Upon which they procure the ship to be arrested by process out of the Admiralty, and compelled those who intended to send the ship a voyage, to enter into recognizance in the Admiralty, conditioned that the ship should safely return. After which the ship began a voyage, in which she was lost. And upon this the persons, who were bound for the safe return of the ship, were sued in the Admiralty. Upon which a motion was made, in the Court of King's Bench, for a prohibition; 1. Because the recognizance not being in nature of a stipulation, the Admiralty had not power to compel the party to enter into it. 2. Because this suit being in nature of debt upon a recognizance, the Admiralty had not cognizance of it. But the prohibition was denied by the Court (*absente Holt* Chief Justice) because this suit is between the part-owners of the ship, and the property is admitted; and therefore it is properly conuable there. 2. If the Admiralty had not power to take such recognizances, all navigation must be obstructed, if one obstinate part-owner would not consent, that the ship should make a voyage; and *e contra*, it is very reasonable that he have security^o, that the ship

^o A suit may be maintained in the Admiralty on such security. *Ld. Raym.* 235. *acc.* 6 *Mod.* 162. 1 *Barn. K. B.* 415. *R. cont. Carth.* 26. *Comb.* 109. *Holt* 647.

shall return in safety, since he does not consent to the voyage.

By the common law as applied to part-owners, each of them is possessed *per my et per tout*, (that is) of the whole and every part, and consequently have a power to enter and detain the ship, even though it be in hindrance or obstruction of a voyage. And this law is recognized by the course and usage of the Admiralty Court, in cases of disagreement among part-owners. Nevertheless such right cannot exist after the other part-owners have given security according to the course of the Admiralty Court.

Thus p if there are several part-owners of a ship, and the major part of them are for sending her a voyage to sea, to which the rest disagree; whereupon, according to the common usage in such cases, the greater number suggest in the Admiralty Court the disagreement of their partner, and then according to their usage there, they order certain persons to appraise the ship, who accordingly set a value thereon; and then the major part who agreed to the voyage, enter into a recogni-

p Carth. 26. Hard. 473. S. P. 6 Mod. 162. S. P. Vide 6 Mod. 12, 26, 79.

ance, wherein they bind themselves jointly and severally, to the disagreeing parties, in a sum proportionable to their shares, according to the value set by the appraisers, to secure the shares in the ship of those who disagree to the voyage, against all adventures; though there can be no suit on this agreement or stipulation in the Admiralty Court, the contract being made on land, and therefore of temporal consueance; yet a special action on the case lies for the violation thereof at common law; so, that if there be several part-owners of a ship, and some of them refuse to navigate the ship, or to send her to sea; those, who are willing, may compel the others in a Court of Admiralty, on giving security to answer for the ship in case she be lost; also if a partner dislikes the voyage, but does not expressly prohibit it, and the ship is lost in the voyage, he shall have no recompence for his part; but if the ship return, he shall have an account for what is earned, and it shall be intended a voyage with his consent, without an express prohibition proved.

So 9, four joint-owners in a ship; three will navigate the ship, the fourth will not;

1 Skin. 230. 2 Chan. Ca. 36.

H

the

the course is to go into the Admiralty, and there give security to answer for the ship if she be lost, and then they shall be discharged against the other. If one dislike the voyage, and doth not expressly prohibit navigating the ship, and the ship go the voyage, and is lost, in such case he shall not be answered his part; but if the ship return, he shall have an account, for what is earned, and it shall be intended a voyage with his consent, without an express prohibition proved. As if four tenants in common of land, one or more stock the land, and manage it, the rest shall have an account of the profits; but if a loss come, as if the sheep, &c. die, they shall bear a part. *Per North Lord Keeper.*

Part-owners being tenants in common of a ship; “ If one tenant in common *destroys* the “ thing held in common, the other may have “ trover against him for it, for that is a *total* “ conversion to his own use of what he had “ only a part r.”

So s, where one part-owner of a ship took her, and sent her on a voyage to the *West-Indies*, where she was lost, and the other

r Co. Litt. 200. a.

s Hil. 1 Geo. 1. Bull. N. P. 34.

owners having brought an action for it, Lord King left it to the jury, whether, they being tenants in common of the ship, this was not a *destruction* by the defendant? and the jury found accordingly, and the plaintiff recovered.

But otherwise in the case of *partners in trade*^t, each has a power singly to dispose of the whole partnership effects, and even if one of the partners becomes a bankrupt, yet every act of the solvent partner without knowledge of the act of bankruptcy, as in making consignments or sales of goods, &c. if done *bonâ fide* and without fraud, is good, so that the assignees of the bankrupt partner cannot recover by this action the goods so disposed of by the other; neither if the solvent partner afterwards becomes himself a bankrupt, can the assignees under the joint commission against both, maintain trover against the *bonâ fide* vendee or consignee of the partnership effects.

As to the master of a ship, he is not to be considered a partner, because he hath no property either general or special by being

^t Cowp. 445.

constituted a master, but is one ^u, who, for his knowledge in navigation, fidelity, and discretion, hath the government of the ship committed to his care and management; yet masters have usually shares or parts in the vessel^x. And the law considers a master upon all occasions, to be an officer, who must render and give an account for the whole charge when once committed to his care and custody; and upon failure, to render satisfaction; and therefore if misfortunes happen, either through negligence, wilfulness, or ignorance of himself, or his mariners, he must be responsible. And he is eligible by the part-owners, in proportion to their share, and not according to the majority ^y.

And in the case of *Pitt v. Garniez*, where a master of a ship brought an action on the case, and declared, that the ship was laden with corn in such a harbour, ready to sail for *Dantzick*; and that the defendant entered and seized the ship, and detained her, *per quod impeditus et obstructus fuit in viagio*; and it was held that it well lay; for though the master

^u Hob. 11. Moor 918.

^x Molloy 322.

^y Molloy 310. 4 Instit. 146.

1 Saik. 10.

has not the property of the ship, but the owners, and he is only a particular officer, and can only recover for his particular loss, yet he may bring trespass, as a bailiff of goods may, and then as bailiff he can only declare on his possession, which is sufficient to maintain trespass.

If the master of the ship takes goods on board for hire, and is robbed in port, he must answer the damage; otherwise it is if he be robbed by pirates on the high sea, for then the owner must be the loser ^a: for if he undertakes for hire to carry the goods, the common law cannot look upon him in a different aspect from a common carrier; for he cannot be looked upon as a mere servant to the owner, but rather as an officer of the ship, and to sell the *bona peritura*, which is beyond the condition of a servant: but the civil law of the Admiralty excuses the master when robbed by pirates, or on losing the goods by any inevitable accident; for the dangers of the sea are so various and so formidable, that a master shall not be understood to undertake against them, unless it had been included in

^a 1 Vent. 190, 238. Raym. 220. 3 Keb. 72, 112, 135. 1 Mod. 85. 2 Lev. 69. S. C. More and Shee, 3 Lev. 259. S. C. cited 2 Lord Raym. 918.

the exprefs words of the contract ; for where, in a well-ordered fociety, a man undertakes for the cuftody of another's property, he fecures him againft all lofs ; but where a man is bound to encounter dangers, which civil fociety cannot guard againft, he muft not be fupposed to undertake farther than for his care ; and by the general cuftom of commerce, the merchant is the perfon who runs the risk, and not the mafter of the fhip ; and it is the merchant alfo who makes the gain of the venture.

And, as the mafter himfelf is anfwerable in the foregoing cafes ; fo likewise hath it been held, that the owners are liable to the freighters, in refpect of the freight, for the embezzlements, &c. of the mafter and mariners ^b.

But this proving a great difcouragement to trade, by the 7 *Geo. 2. c. 15.* reciting that, Whereas it is of the greateft confequence and importance to this kingdom, to promote the increafe of the number of fhips and veffels, and to prevent any difcouragement to merchants and others from being interefted and

^b Carth. 58. 2 Salk. 440. 3 Lev. 258. 3 Mod. 322.

concerned therein ; and whereas it has been held that in many cases owners of ships or vessels are answerable for goods and merchandize shipped, or put on board the same, although the said goods and merchandize after the same have been so put on board, should be made away with by the masters or mariners of the said ships or vessels, without the knowledge or privity of the owner or owners, by means whereof, merchants and others are greatly discouraged from adventuring their fortunes, as owners of ships or vessels, which will necessarily tend to the prejudice of the trade and navigation of this kingdom ; therefore, for ascertaining and settling how far owners of ships and vessels shall be answerable for any gold, silver, diamonds, jewels, precious stones, or other goods or merchandize which shall be made away with by the master or mariners, without the privity of the owners thereof, it is enacted, “ That no person or
 “ persons who is, are or shall be owner or
 “ owners of any ship or vessel, shall be subject
 “ or liable to answer for, or make good to
 “ any one or more person or persons, any loss
 “ or damage by reason of any embezzle-
 “ ment, secreting or making away with, (by
 “ the master or mariners, or any of them) of
 “ any gold, silver, diamonds, jewels, precious
 H 4 “ stones,

“stones, or other goods or merchandize,
 “which from and after the 24th of *June*,
 “1734, shall be shipped, taken in, or put on
 “board any ship or vessel, or for any act,
 “matter or thing, damage or forfeiture done,
 “occasioned or incurred from and after the said
 “24th day of *June*, 1734, by the said master
 “or mariners, or any of them, without the
 “privity and knowledge of such owner or
 “owners, further than the value of the ship or
 “vessel, with all her appurtenances, and the
 “full amount of the freight, due or to grow
 “due, for and during the voyage wherein
 “such embezzlement, secreting or making
 “away with, as aforesaid, or other malversa-
 “tion of the master or mariners, shall be
 “made, committed or done; any law, &c.”

And *sect.* 2. it is further enacted, “That if
 “several freighters or proprietors of any such
 “gold, silver, diamonds, jewels, precious
 “stones, or other goods or merchandize, shall
 “suffer any loss or damage by any of the
 “means aforesaid, in the same voyage, and
 “the value of the ship or vessel with all her
 “appurtenances, and the amount of the
 “freight, due or to grow due, during such
 “voyage, shall not be sufficient to make full
 “compensation to all and every of them,
 “then such freighters or proprietors shall re-
 “ceive

“ ceive their satisfaction thereout in average,
 “ in proportion to their respective losses or
 “ damages; and in every such case it shall
 “ and may be lawful to and for such freight-
 “ ers or proprietors, or any of them, in be-
 “ half of himself, and all other such freighters
 “ or proprietors, or to or for the owners of
 “ such ship or vessel, or any of them, on be-
 “ half of himself, and all the other part-
 “ owners of such ship or vessel, to exhibit a
 “ bill in any court of equity for a discovery
 “ of the total amount of such losses or da-
 “ mages, and also of the value of such ship or
 “ vessel, appurtenances and freight, and for
 “ an equal distribution and payment thereof
 “ amongst such freighters or proprietors, in
 “ proportion to their respective losses or da-
 “ mages, according to the rules of equity.”

“ Provided, *sect.* 3. that if any such bill shall
 “ be exhibited by or on the behalf of the
 “ part-owners of such ship, the plaintiff or
 “ plaintiffs shall annex an affidavit to such
 “ bill or bills, that he or they do not collude
 “ with any of the defendants thereto; and
 “ shall thereby offer to pay the value of such
 “ ship or vessel, appurtenances and freight,
 “ as such court shall direct; and such court
 “ shall thereupon take such method for as-
 “ certaining

“ certaining such value, as to them shall seem
 “ just ; and shall direct the payment thereof
 “ in like manner, as is now used and practised
 “ in cases of bills of interpleader. Provided
 “ also, *sect.* 3. that nothing in this present
 “ act contained shall extend, or be construed
 “ to extend to impeach, lessen or discharge
 “ any remedy which any person or persons
 “ now hath, or shall or may hereafter have,
 “ against all, every, or any the master and
 “ mariners of such ship or vessel, for or in
 “ respect of any embezzlement, secreting or
 “ making away with any gold, silver, dia-
 “ monds, jewels, precious stones, or mer-
 “ chandize shipped, or loaded on board such
 “ ship or vessel, or on account of any fraud,
 “ abuse or malversation of and in such
 “ masters and mariners respectively, but that
 “ it shall and may be lawful to and for every
 “ person or persons, so injured or damaged,
 “ to pursue and take such remedy for the
 “ same, against the said master and mariners
 “ respectively, as he or they might have done
 “ before the making of this act.”

Under which statute it has been decided
 that where a large quantity of dollars had
 been shipped on board, and while the ship
 lay at anchor she was boarded by a number
 of

of fresh-water pirates, who robbed her of the dollars; that, as the object of the statute was to protect the owners from all treachery of the master and mariners, and at the same time to subject them as far *as they* trusted the master and mariners; that it was necessary to prove the collusion or assistance of either the master or mariners; therefore in this case, it being proved, that one of the sailors had given information to the robbers when the dollars were brought a-board, and got a share of them, that that satisfied the statute.

Thus, in the case of *Sutton and Mitchel*c, which was in the nature of an action against a common carrier, and it was brought to recover the value of a large quantity of dollars, shipped by the plaintiff, on board the ship *Elbe*, bound from *London* to *Hamburg*h, in the month of *October* 1784, which during the night, were taken by force from on board the ship by a number of fresh-water pirates, as she lay at anchor in the *Thames*. At the trial at *Guildhall*, at the Sittings after *Trinity* term last, before Lord *Mansfield*, the defendant's counsel rested his defence upon the first part of the first section of the 7 *Geo. II. c. 15.* which enacts, that no person or persons, who

is, are, or shall be, owner or owners of any ship or vessel, shall be subject or liable to answer for, or make good to any one person or persons, any loss or damage by reason of any embezzlement, secreting, or making away with, by the master or mariners, or any of them, of any gold, silver, diamonds, jewels, precious stones, or other goods or merchandize, which from and after the 24th of *June* 1734, shall be shipped, taken in, or put on board any ship or vessel, beyond the value of the ship and freight. And evidence was offered to prove, that one of the mariners was accessory in the robbery by giving intelligence. But Lord *Mansfield* was then of opinion, that the word embezzlement was not broad enough to cover this transaction, and therefore he directed the jury to find for the plaintiff to the whole amount of the dollars. The motion for a new trial, by *Mingay*, was founded on the latter part of the same section in the Act, the words of which are more general, and comprehend any act, matter, or thing, damage, or forfeiture done, occasioned, or incurred, from and after the said 24th of *June* 1734, by the said master or mariners, or any of them, without the privity or knowledge of such owner or owners, further than the value of the ship or vessel,

vessel, with all her appurtenances, and the full amount of the freight due, or to grow due, for and during the voyage, &c. *Bearcroft, Lee, and Baldwin*, for the plaintiff, took notice that this motion was founded on an affidavit that one of the mariners had informed one of the robbers, that if he would give him a share, he would inform him of the day on which the money was to be sent on board, and where it was placed, and that the same mariner afterwards shared the spoil. There is no doubt but that the owners of a ship are liable for the full amount of every loss by robbery; and the only question here is upon the 7 *Geo. II.* which says, that the owners shall not be liable for more than the value of the ship and freight, in any case of embezzlement by the master or mariners; but in order to exculpate the owner, it should appear that one of the mariners was actually concerned in the robbery. Now, does this motion state a case in which he could be prosecuted as a party: for it does not follow that because one tells another where a treasure is to be found, that a felony must be committed: and if he is to be taken as one of the actors in point of law, the consequence must be, he is guilty of felony, and then you must shew that he is guilty of felony on the affidavits.

vits. Here he does not appear to be a principal in the robbery ; he is only an accessory after the fact, by receiving part of the goods stolen. As to the word “ occasioned”, it relates only to forfeiture. The words of the Act exclude all idea of force : but this is expressly admitted to have been done by force. And it is laid down by *Foster*, that a person who is charged with privately stealing must be acquitted, if there be any evidence of force being used. *Mingay*, in support of the rule, relied upon the latter part of the section above mentioned. Lord *Mansfield*, Ch. J.—The act of Parliament is certainly large enough to take in this matter. I decided it before on the first part of the section : the latter part was not relied on, or even mentioned at the trial. *Willes* and *Ashburst*, Justices, concurred. *Buller*, J.—This act is as strong as possible, and was meant to protect the owner against all treachery in the master or mariners, as appears from the clause in question as well as the preamble of the act. It meant to relieve the owners of ships from hardships, and to encourage them ; at the same time saying, that so far as you have trusted the master and mariners yourself, so far you shall be answerable ; which is to the value of the ship and freight. This man is
an

an accessory both before and after the fact: If the argument for the plaintiff holds it would confine it to the act of the mariner only: but suppose a mariner combined with three or four other persons, there could be no doubt but that that would come within the provision of the statute.

Rule made absolute ^d.

And for such general charges against the ship, the owners are specifically liable.

Thus, in the case of *Parish v. Crawford*, where the defendant was sole owner of a ship, which he let to *Fletcher* for a voyage at a certain sum, and *Fletcher* was to have the benefit of carrying the goods. The plaintiff had shipped a quantity of moidores, and the bills of lading were signed by the captain; the moidores being lost, an action was brought against the defendant, as owner, to charge him under the stat. 7 Geo. II. to the amount of the ship and freight. For the defendant it was insisted, that *Fletcher* was owner to this purpose, and that he should be sued; but it

^d N. B. The rule was made absolute on payment of costs, because this motion was made on a new ground, not opened before on the trial.

c 2 Stra. 1251.

appear-

appearing that the defendant had covenanted for the condition of the ship and behaviour of the master, it was ruled, that he was liable, for *Fletcher* had only the use, but he had the ownership, and that the freight he had from *Fletcher* was sufficient to charge him.

And if a master of a ship buys provisions for the ship, and has money from the owners to pay for the provisions, but fails without paying the money; the owners are liable to pay in proportion to their respective shares in the ship. For, as for this purpose, the master must be considered as the mere servant to the owners.

So where *Gallway* f, as master of the ship of which other defendants were part-owners, bought several goods of the plaintiffs; as beef, biscuit, sails, and cordage; *Gallway* the master failed. The bill was to compel the defendants, the part-owners, to pay; who insisted, that *Gallway* only was liable; and besides that he had money from the owners to pay the plaintiffs. *Per Cur.* *Gallway* the master was but a servant to the owners; and where a servant buys, the master is liable.

f 2 Vern. 543.

If the owners paid their servant, yet if he paid not the creditors, they must stand liable: and decreed the owners to pay the plaintiffs their debts in proportion to their respective shares and interests in the ship.

Special partnership may also be contracted under a charter-party, and all the parties so covenanting become liable in a given extent, as partners according to the law-merchant.

A charty-party is an old instrument, inaccurate and informal, and, by the introduction of different clauses, at different times, it is also sometimes contradictory; but, like all mercantile contracts, it ought to have a liberal interpretation. *Per Lord Mansfield^h*, in the case of *Hotham and the East-India Company*.

The charter-party settles the agreement as the bills of lading do the contents of the cargo. (There are three bills of lading generally made, one to be sent over sea to him whom the goods are consigned to, another for the master, and the third for the mer-

^g Molloy 366.

^h Dougl. 277.

chant or lader), and binds the master to deliver them well conditioned, at the place of discharge, according to the agreement; and for the performance, the master or the owner obliges himself, ship, tackle, and furnitureⁱ. And the parties are either owners of ships on the one part, and merchants on the other; or masters of ships invested by the owners with power to enter into charter-parties, and merchants.

Charter-parties, says *Molloy*, “ have always by the common law had a genuine construction, as near as may be, and according to the intention and design, and not according to the literal sense of traders, or those who merchandize by sea;” yet they must be regularly pleaded, that is, in case of litigation, there must be a narration of facts in a legal form, in order to facilitate the determination of a Court upon such agreements according to the intention of the parties, and the nature of the contract; and such appears to have been the construction which led the judgment of the Court in deciding upon the question of *ship-damage* under a charter-party of freightment between *Hotham and two Others* against the *East-India Company*^k. In this case,

ⁱ Molloy 365.

^k Dougl. 272.

the ship *York*, of which two of the plaintiffs were part-owners, and the third captain, had been freighted by a charter-party between them and the *East-India* Company, on a voyage from *London* to *India*, and back to *London*¹. On her return home, she met with a most uncommonly violent storm, off *Margate*, where she was stranded, on the first of *January* 1779, and sunk under water. By this misfortune, a great part of her cargo (being salt-petre) was lost; the principal part of what remained, which consisted chiefly of pepper, was greatly damaged by the seawater, but was got out of the ship, by persons sent down by the Company, and brought to town in other vessels, where a particular process was employed, at a great expence to the Company, to restore it, in some degree, and render it marketable. The ship, after being in a great measure unloaded, was with much difficulty, raised out of the water, and arrived in the port of *London*, with a small part of the cargo still remaining on board. The plaintiffs insisted, that she had arrived at her port of discharge, and had performed her voyage within the meaning of the charter party, and that, notwithstanding the mis-

¹ Dougl. 272. 18th November 1779.

fortune which had happened, and the loss of part, and the damage done to the rest, of the cargo, they were entitled to be paid the freight of the goods saved, and the demurrage. The defendants contended; first, that in the events which had happened, they were discharged from the payment of any freight or demurrage; secondly, that if they were liable for freight and demurrage, yet by certain clauses in the charter-party, they were entitled to deduct therefrom the value of the goods lost; the loss upon those which were saved in a damaged state; and the expences they had been put to in getting those damaged goods to *London* and rendering them marketable. A common action of covenant was at first brought on the charter-party, to which the defendants pleaded; but afterwards both parties consented to try the questions in dispute between them in four different feigned issues, which were as follows: 1. Whether the plaintiffs were, or were not, entitled to any and what freight or demurrage in respect of the ship and voyage, in the charter-party mentioned; 2. Whether the plaintiffs were liable to pay or allow to the defendants any sum or sums of money in respect of the goods and merchandizes which had been shipped on board the said ship, and which had been lost,

or not delivered to the defendants on her arrival in *England*; 3. Whether the plaintiffs were liable to pay or allow, &c. in respect of a certain quantity of pepper which had been shipped, &c. and which had been prejudiced, wet, and damnified, before the arrival of the ship at *London*; 4. Whether the plaintiffs ought to pay or make satisfaction to the defendants, for the expences they were at, in saving and bringing to *London* certain goods and merchandizes which were taken out of the ship when she was stranded, or otherwise concerning the said goods; these issues came on to be tried, before Lord *Mansfield*, at *Guildhall*, at the Sittings after last *Trinity* term. There were two clauses in the charty-party on which the defence on the first issue was founded, viz. 1. "And, as touching the freight to be paid or allowed by the Company, it is agreed, and the Company covenant with the said part-owners, that the Company shall, and will, in case and upon condition that the ship performs her voyage, and arrives at *London* in safety, and the said part-owners and masters do perform the covenants on their part, and not otherwise, well and truly pay and allow the freight herein mentioned^m. 2. It is

^m P. 8. of the printed form of the East-India Company's Charter-parties.

hereby agreed, that, in case the ship does not arrive in safety in the river *Thames*, and there make a right delivery of the whole and entire cargo and lading on board the said ship as aforesaid, the Company shall not be liable to pay any of the sums of money herein before agreed to be paid for freight and demurrage, nor subject to any demands of the said part-owners or master on account of the said ship's earnings in freight, voyages for the Company, or on account of any other employment, any other law, usage, practice or custom, notwithstandingⁿ. The following clause was the foundation of the defence on the second issue. And, if any of the homeward-bound cargo shall be lost or undelivered into the said Company's warehouses at the said ship's arrival in *England*, (except that no such payment shall be made if there happens an utter inevitable loss of ship and cargo, nor shall any other payment be made for such goods as shall necessarily perish or be cast into the sea for the preservation of the ship and cargo, than by an average to be borne by ship, freight, demurrage, and cargo,) the part-owners and master, shall pay or allow to the Company the prime cost of such goods, and 30*l.* for every 100*l.* on

ⁿ P. 111. of the printed form of the East-India Company's Charter-parties.

such prime cost o. On the third issue they relied on the following clauses: 1. But if any of the homeward-bound cargo, when delivered into the Company's warehouses in *England*, shall be found to be prejudiced, wet, or damnified, by any occasion or accident whatsoever, it shall be lawful for the Company to refuse such goods, and in such case the part-owners and master shall take them, and allow to the Company the sums which they are invoiced at, with charges, customs, and duties; and in such case the Company shall pay no charges or freight for the said goods so prejudiced, wet, or damnified, unless in cases of damaged pepper, which the part-owners and master are to allow the Company for at the current price of sound pepper in *London*, and the Company are to pay the freight and charges on such pepper as if it were not damnified P. 2. But the said part-owners shall not be charged with any sum of money in respect of goods damaged on board the said ship, but such as shall, by the condition and appearance of the package thereof, or by some other reasonable proof, appear to be ship-damage; any thing

o P. 4, 5, of the printed form of the East-India Company's Charter-parties.

P Ibid. p. 4, 5.

herein contained to the contrary thereof in any wise notwithstanding^q.” 3. A provision for paying demurrage to the owners, if the ship should be dispatched safe from the *Malabar* coast, and should not make the passage in a limited time; and which adds, “and the owners shall not be responsible for any damage that may happen to the homeward-bound cargo, occasioned by such late dispatch^r.”

The jury having found for the plaintiffs on the three first issues, *viz.* 1. That freight was to be paid for all the Company's goods delivered, and demurrage, as specified in the charter-party: 2. That the plaintiffs were not liable to pay for any goods lost, or not delivered: 3. That they were not liable to pay or allow for any loss on the pepper, and for the defendants on the cost, (*viz.* That the plaintiffs were to pay to the defendants their proportion of the expences in saving the goods and merchandizes, by way of general average, as specified in the charter-party, and the whole extra expence of bringing the

^q P. 13. of the printed form of the East-India Company's charter-parties.

^r Ibid. p. 14.

goods from *Margate*), a rule was obtained by the defendants to shew cause why there should not be a new trial on all the issues found against them; and the case was argued this day, by *Lee, Davenport, Baldwin, and Erskine*, for the plaintiffs, and the Solicitor-General and *Dunning*, for the defendants. The counsel for the defendants relied, as to the freight and demurrage, on the strict terms of the instrument, by which it was stipulated, that neither should be paid for, unless the ship should arrive in safety in the river *Thames*, and there make a right delivery of the whole and entire cargo. If the plaintiffs had proceeded in covenant, such an arrival and such a delivery must have been averred, and was now necessary to have been proved, to make out the case on the part of the plaintiffs. In a court of law, the stipulations of the deed must appear to have been exactly complied with; and, if any relaxation was to be allowed, on principles of equity, recourse must be had to a court of equity. The same reasoning was equally applicable to the second issue. On the third, they insisted, that "ship damage" was synonymous to "sea damage," and meant, damage happening at sea, in contradistinction to any injury the goods might have received before they were put on board,

not

not merely damage at sea occasioned by insufficiency in the ship, or the misconduct or negligence of the master or mariners, which was the interpretation contended for on the part of the plaintiffs. Without any stipulation, the owners and master would have been answerable to the Company for losses arising from those causes. The word "ship damage," it is true, was meant to controul the general words in a preceding part of the instrument, by virtue of which the plaintiffs would otherwise have been liable, if the goods had been prejudiced or damnified by any occasion or accident of any sort; but, according to the construction contended for by the plaintiffs, this prior clause would be totally annulled by the other.

The saving in case of a late departure from the *Malabar* coast, affords an additional proof that sea-hazards from weather, storm, &c. were meant. For how could a detention beyond the usual season increase the danger of damage from insufficiency in the vessel (independent of what the weather might occasion) or from misconduct in the master or the crew? On the other side, it was insisted, that this sort of instrument ought to receive a liberal construction. The non-compliance with

with the letter of it, in not delivering the cargo in the river *Thames*, was owing to the act of the defendants themselves, in sending their servants on board, who took it out of the ship without any participation with the plaintiffs. This discharged them from the necessity of performing strictly that part of the contract (as to which the case of *Sparrow v. Caruthers*, reported in *Strangers*, was in point), and the discharge might have been averred in an action of covenant. That as to the goods damaged or lost, the charter-party was certainly very confused and ill digested, full of contradictions, owing to the circumstance of different clauses having been added at different times, without attention to the coherence and consistency of the whole. But it must be interpreted in a manner the most consistent with good sense, and the nature and general tendency of the whole contract. The expression of "ship damage" could not be used in opposition to damage received before the goods are put on board, because the owners could never be answerable for that sort of injury, and therefore it never could have been thought necessary to introduce words to declare that they were not.

• T. 18 Geo. 2. Str. 1236.

It was said, that the clause mentioning ship damage was first introduced 1759, when the *Ilchester East-India-Man* was lost. The then *Solicitor General* had given an opinion, that the charter-party, as it then stood, would make the owners liable for losses by storms, and with the express design of preventing that construction, this new clause was adopted.

It must mean damage received on board the ship, and occasioned by negligence or misconduct; surely not damage arising, as in the present case, from the act of God, which no human care could prevent.

If there were any doubt, the special jury who had exercised their judgment upon it were certainly most competent to determine it, no question being more exclusively fit for their consideration. The owners therefore were by that clause exempted from responsibility for any other sort of damage but ship-damage so understood, and the foregoing words “by any accident whatsoever,” were thereby controuled and restrained. Then, as to the goods lost, this being the clear meaning of ship-damage, and universally so understood by persons conversant with the subject, it could never be the intention of the
contract,

contract, that, though the owners were not to be answerable for goods damaged, they were for goods lost, by the act of God. The strict compliance with the words on which the defendants relied as to the goods lost, was never expected. The cargoes of *Indiamen* are never delivered into the Company's warehouses, but only into lighters belonging to the Company. *Edwin v. the East-India Company* ^t, and *Edwards v. Child* ^u, were cited.

Lord Mansfield. I have no doubt, but that, if the delivery at *Margate* was, in the contemplation of the parties, substituted for a delivery at *London*, it might have been averred in an action of covenant^v, because there can be no material fact in a cause which may not be put upon record, or given in evidence on the general issue. The Company are not liable to any imputation. The part they took, when the calamity happened, was what humanity and justice required, and can be of no prejudice to either side. The charter-party is an old instrument, informal, and, by the introduction of different clauses, at different times, inaccurate, and sometimes contra-

^t Canc. H. 1690. 2 Vern. 210.

^u Canc. M. 1716. 2 Vern. 727.

^v Vide *Jones v. Barkley*, Dougl. 684.

dictory.

dictory. Like all mercantile contracts, it ought to have a liberal interpretation. In construing agreements, I know no difference between a court of law and a court of equity. In the case of *Edwin v. the East-India Company*, *Vernon* makes the court say, “ Though the charter-party is so penned, that nothing can be recovered at law, yet the plaintiffs have a just demand, and ought to be relieved in equity.”

A court of equity cannot make an agreement for the parties; it can only explain what their true meaning was; and that is also the duty of a court of law. I told the jury, that the instrument must have a liberal construction, according to the true intention, and I left the construction to them more than in common cases ought to be done, because the province of construing written instruments belongs to the Court. On the point of ship-damage I had considerable doubts, which I stated fully to the jury. The Company have thought fit to bring the case before the Court, but, upon hearing the arguments, I am now clear that the verdict was right on all the issues. As to the first, the Company, by receiving part of the cargo, have waved all objections concerning the delivery. (His Lordship

ship had interrupted the defendant's counsel to ask, whether the Company could mean seriously to insist, that they were to have the use of the ship, and the goods which had been delivered, and not pay for the freight of them?)

The principal question is, whether the owners are to pay for the damage occasioned by the storm—the act of God; and this must be determined by the intention of the parties, and the nature of the contract. It is a charter of freight. The owners let their ships to hire, and there never was an idea that they insure the cargo against the perils of the sea. The Company stand their own insurers. Words must be construed according to the subject matter. What are the obligations upon the owners which arise out of the fair construction of the charter-party; why, that they shall be answerable for damage incurred by their own fault, or that of their servants, as from defects in the ship, or improper stowage; such as mixing commodities together which hurt one another, &c. If they were liable for damages occasioned by storms, they would become insurers, not freighters. Many of the difficulties which have been raised, are occasioned by the multiplicity of unnecessary words, introduced with a view to be more
expli-

explicit; an effect which often arises from the same cause in acts of Parliament. It seems the question had occurred in the year 1759, and the clause mentioning ship-damage was introduced in order to fix the risks for which the owners were to be answerable. That clause rides over all the former part of the charter-party. As to the other point of the goods lost, the whole is one entire contract, and must be understood in a manner consistent with itself; and it never could be intended, that the owners should be protected from the lesser loss, and remain answerable for the greater.

Willes Justice, absent.

Ashurst Justice.—I am of the same opinion. The consideration, that the owners are not insurers, controuls every branch of the instrument. If the proviso concerning ship-damage had been wanting, there might have been some doubt; as the case stands there is none.

Buller Justice.—I am of the same opinion. There could have been no doubt on the subject of the first issue, if the parties had gone on in the usual way, by an action
of

of covenant on the charter-party. If an act undertaken to be done is dispensed with by the other party it is sufficient so to state it on the record; special pleading being nothing but a bare narration of facts in a legal form.

The rule discharged.

CHAPTER VI.

Partnership—
Entering into.

PARTNERSHIP cannot be entered into or contracted without the consent^a of all the partners, who ought reciprocally to choose and approve of one another, in order to form among themselves that sort of tie, which is aptly described as a kind of brotherhood^b.

The free choice of the persons contracting is so essentially necessary to the constituting of a partnership, that even the executors and representatives of partners themselves do not, in their capacity of executors or representatives, succeed to the state and condition of partners^c.

In the very formation of a partnership contract such attention and care is exacted from each partner, as every prudent man takes of

^a Consent is necessary to complete every contract.
4 Burr. 2241.

^b *Societas jus quodammodo fraternitatis in se habet.* Dig. l. 63. ff. pro. soc.

^c *Nec hæres socii succedit.* l. 65. § 9. pro. soc. b.
2 Vez. 33.

his own concerns, which is certainly a good mode of ensuring the share contributed by each partner, and affords the ready means to secure good fellowship, and to promote that enterprizing spirit which is so eminently useful for the encouragement of our trade and commerce with other nations. And with no small share of truth might it be observed, with reference to our island and its inhabitants, that the philosopher may arrive at an high pitch of improvement in agriculture, arts, and sciences; the husbandman, the artizan, and the manufacturer, may reduce such speculative knowledge to practical uses, with the greatest skill and dexterity on their parts; Government itself may enact the wisest laws, and give all desirable encouragement for the advancement of commerce; yet what can even all this avail, without the penetration and sagacity of our merchants, and traders, to export the produce of our lands, and the labors of our artists and manufacturers into foreign countries, with advantage to the State, as well as to themselves? It is observed by *Molloy*, “ That foreign trade is the
 “ main sheet-anchor of us islanders; without
 “ which, the genius of all our useful studies
 “ and the which renders men famous and
 “ renowned, would make them useless and

“ insignificant to the public.” And Lord Chancellor *Bacon* observes, that “ MERCHANTS AND TRADERS ARE IN A STATE, WHAT THE BLOOD IS TO THE BODY.” The enterprise, abilities and ingenuity of this part of the community are therefore most certainly of the utmost importance to the whole *British* empire. From such considerations as these, there naturally arises the idea of propagating, by the best possible means, that species of commerce, which makes us masters of the treasures of other nations and countries, and which begets and maintains our seamen.

And perhaps there cannot be a more ready method to propagate commerce of such a nature, than by uniting the joint efforts of skilful and enterprizing merchants in co-partnership; which has already been shewn to consist in joining together the interests of two or more merchants or traders for the purpose of advancing and improving commerce. And upon entering into partnership, the subject of which comprizes the capital stock, and the interest of each partner therein; together with the labor and skill to be employed, and the division thereof; what naturally occurs in point of distribution seems to be, that if each partner contributes an equal proportion of capital
stock,

stock, labor, and skill, then each must receive an equal share in the profit and loss; but where they contribute unequally, certain rules should be prescribed according to the circumstances of the partnership, for the purpose of adjusting the respective shares of all the partners.

For instance, if one partner furnishes labor, and the other money, whatever the produce of such partnership trade may amount to, it should seem right to divide it, after deducting the sum advanced, in the proportion of the interest of the money to the wages of the labor, allowing such a rate of interest as money might be borrowed for upon the same species of security, and such wages or allowance as a skilful workman would be entitled to for the same degree of labor and a similar trust.

According to the principle laid down in the civil law, which says, ^d that no man doubts, but that partnership may be entered into by two persons, when one of them only finds money, in as much as it often happens,

^d Instit. lib. 3. tit. 26. De Societat. § 2.

“ *Nam et ita coiri posse societatem non aubitamus, ut
“ alter pecuniam conferat, alter non conferat, et tamen lucrum
“ inter eos commune sit; quia sæpe opera alicujus pro pecunia
“ valet.*”

that the work and labor of the other amounts to the value of it and supplies its place.

For in partnerships where on the one side labor is contributed and on the other only the *use* of money, that partner who contributed the money does not always admit the other to a share of the principal; but only to his share of the profit, which such labor and money joined together might produce. And if *A.* for instance, who furnishes labor only hath no title to any part of the money advanced upon dissolving the partnership, so *B.* alone should be liable to the risk of the money as owner thereof; for in such a case it is not the money itself but the risk which it runs, and the probable gain which may accrue from it, that are to be compared with the labor.

Therefore when the profits of such a partnership are to be shared, it would be out of all proportion in point of reciprocal advantage if the labor were to be compared with the principal sum advanced; and the only fair criterion to judge by, is a true comparison between the value of the labor on one side, and the risk and hazard which the money advanced is exposed to on the other. And perhaps the
better

better way in forming partnerships of this sort is to rate the risk of the principal and the hopes of the profit according to the interest that is generally given for money so borrowed upon risk. Supposing then this interest to be *6 l. per cent.* if one party contributes labor worth *60 l.* and the other advances *1000 l.* in money, each partner will share equally of the profit. According to this rule, if there should be nothing gained by the partnership concern, *A.* would lose his labor, and *B.* his interest, which would be equal and just. And should the original stock be diminished, by the same rule *A.* loses only his labor, whereas *B.* would lose his interest and a part of the principal, for which eventual disadvantage *B.* is compensated by having the interest of his money computed at *six pounds per cent.* in the division of the profits, where there are any.

But it sometimes happens in partnership concerns, that labor and money are so blended or interwoven together, as to give to him that contributed only his labor, a share in the principal; the labor contributed by one partner, and the money advanced by the other, being so intermixed as to make one general mass. As for example, one partner

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spends

spends the money advanced by him in buying up unwrought materials, and the other furnishes personal skill and labor to work them up and manage them, which very often happens in large manufacturing towns. Thus, again, if I supply a weaver with 100 *l.* to buy wool, and he makes cloth of it; computing his labor at 100 *l.* it is manifest that here both of us have an equal interest in the cloth; and when it is sold, the money must be equally divided: Nor in fairness could I deduct the 100 *l.* contributed at first, and then divide the remainder with him.

This rule^e obtains in other things as well as money, as when one allows ground for a building, on condition that he who builds thereon shall have a moiety: or, as when one trusts a flock to be fed, on condition that if it be sold within a limited time, the money shall be proportionably divided amongst the partners^f.

But, in order to prevent litigation and strife between partners, the division of the profit ought never to be forgotten in the constitution of the partnership, and it is there-

^e Digest. lib. 19. tit. 5.

^f Grotius, l. 2. c. 12. f. 24.

fore commonly settled, in a regular partnership, by express agreements : yet these agreements, to be equitable, should pursue the principle of the rule here laid down, whenever such partnership is to be entered into.

And upon entering into partnerships which are mixt in their nature, by one partner's contributing the whole of the money, and another labour and skill, perhaps the most convenient form of arrangement might be to divide the whole concern into a certain number of *aliquot* parts or portions, and to assign to each partner respectively his agreed number of shares, by which his proportion of the profit or loss is to be regulated. For it should be considered upon every occasion where money is so advanced for the purpose of entering into partnership, that all the partners are bound by what any one of them afterwards does in the course of the business ; for, *quoad hoc*, each partner is considered as an authorised agent of the rest, and all are respectively implicated, and each becomes liable to the fullest extent in such trade or business.—Thus in the case of *Hubert* and *Nelson*, where a gentleman engaged in trade, but did not appear in the partnership s.

* 26th Oct. 1734. Davies's Bankrupt Law, p. 8.

Philip Hubert, of the parish of *St. Anne, Westminster*, in the county of *Middlesex*, Esq; enters into articles of copartnership with *Robert Nelson*, of *London*, diamond-merchant, in manner following:— The articles recite, That *Hubert* having experience of Mr. *Nelson's* fidelity, had agreed to carry on the trade of a diamond-cutter with him for the space of one year, and to be concerned in the profit and loss of buying, selling and retailing of diamonds; and *Hubert*, towards carrying on the trade, agreed to advance and bring into the said trade 500*l.* viz. 100*l.* for buying of mills and other materials, and 400*l.* for buying of rough diamonds for their mutual benefit and advantage. And as *Nelson* was the jeweller, he was in the first place to be allowed for cutting and polishing every carot of diamonds 14*s.* and after such deductions the half of the profit and loss was to be divided and sustained between them. And *Nelson* agreed that he would be faithful to *Hubert*, and that a true account of all their dealings should be taken every three months, and for that purpose that he (*Nelson*) would fairly write down all such transactions and dealings in some convenient book or books of account to be kept by the said *Nelson*, of which the said *Hubert* should at all times during

during the copartnership have the sight and perusal, and the liberty to transcribe any part thereof. But it was thereby agreed, That the said *Nelson* should make such entries and carry on such trade on his own separate account and risque, and not as a partner of *Hubert*, who was not to be liable to any of the said *Nelson's* debts or engagements, save as in manner aforesaid. And it was also agreed, that neither of the parties would do any act whereby the said 400*l.* should be prejudiced or lessened, nor should such 400*l.* be charged or affected in any degree, by reason or means of any private debt or debts, which then was or should then after grow due from the said *Robert Nelson* on his own private account; and that the co-partnership should continue for one year, and so from year to year for seven years, if *Hubert* should require the same; and that if *Hubert* should at the end of the first year, or any other year during the said seven years, be minded or desirous to call in the said 500*l.* so agreed and thereby understood between the parties to be only lent from *Hubert* to *Nelson*, on the terms aforesaid, and to end the said partnership; that then the said *Hubert* should give to the said *Nelson* three months notice before the end of each or any of the said years,

of

of such his mind or desire, in writing, to be signed by the said *Hubert*, and which the said *Nelson* was thereby bound to observe and comply with. And it was farther agreed that *Nelson* should be allowed all such expences as he should be put to in preparing or finishing any commodity belonging to the trade; and that if *Hubert* should during the co-partnership advance any sum to *Nelson*, or if *Nelson* should advance any sum of money of his own, which both were at liberty to do, that the profit and loss of such sum or sums should be equally borne between them, and that *Nelson* should not during the co-partnership take any sum from any other person on the terms of the co-partnership, so as to intitle any person to any profit from the trades or either of them in conjunction with *Nelson*, without *Hubert's* leave. And for the performance of these articles each bound himself to the other in the penalty of 1000*l.* and on the back of these articles there was a memorandum indorsed, that before the execution thereof it was agreed, that if any sum should be advanced by either of them to carry on their trades, without the like sum being advanced by the other, that the party so advancing should be allowed by the other interest for a moiety

moiety of such money after the rate of 5*l.* per cent. After these articles were entered into, *Nelson* being the acting partner and bred a jeweller, carried on the trade from the year 1734, to the year 1738. without making any discovery of his partnership to his creditors, except to a few of his most intimate friends, and during that time contracted some debts in the jewelling trade to persons who at that time were wholly unacquainted with the co partnership, and *Nelson* gave his own separate notes for such debts, without mentioning company or partner. In *October* 1738, *Nelson* shews the articles to several of the creditors, who sold him large parcels of diamonds on the credit thereof, and *Nelson* gave promissory notes for himself and Company, which were afterwards proved under the commission. *Hubert* finding that *Nelson* had discovered the co-partnership, and that he had given notes for himself and Company to a great sum, applied to *Nelson* to settle with him, and to deliver up the articles; but *Nelson's* demands being too high for *Hubert*, on the 20th of *December* 1738, *Hubert*, in order to protect his estate from the debts which *Nelson* had contracted, makes a conveyance of all his real and personal estate, and then retires to
France.

France. On the 15th of *January* 1738, a joint commission issued against *Hubert* and *Nelson*, as partners, and on such joint commission they were declared bankrupts. On the 30th of *January* 1738, *Hubert* prefers a petition to the right honourable the Lord High Chancellor, setting forth, that in *October* 1734, he lent *Nelson* 500*l.* for which he gave him his bond, and that on such bond there was then due to him 380*l.* which he had demanded payment of; and that *Nelson* not only refused him payment, but threatned, that unless he would deliver up the bond, and give him 1500*l.* that *Nelson* would swear that *Hubert* was his partner, and that he would contract debts to 10,000*l.* which he would subject *Hubert* to pay. That a commission had been awarded against *Nelson*, and a joint commission against *Nelson* and *Hubert* as jewellers and partners, on the petition of one *John Hardham* a diamond cutter, who pretended there was a debt of 1500*l.* due to him from *Nelson*, which *Hubert* was subject to pay. That *Hubert* was possessed of 1000*l.* per annum, estate, and never had any dealings or transactions with *Hardham*, or committed any act of bankruptcy. That the 31st of *January* was appointed for choice of assignees, and
that

that the messengers under the commission had seized a great quantity of plate, which if they should proceed to dispose of, would be a great loss to him. And therefore *Hubert* prayed, that the joint commission against him and *Nelson* might, as against *Hubert*, be superseded, and that in the mean time all proceedings might thereupon be stayed until a writ should issue for that purpose. The petitioner *Hubert*, in the petition took no notice of the articles of co-partnership which were between him and *Nelson*; and on the 3d of *February* following this petition came on by special appointment, and was heard at his Lordship's house in *Ormond street*. And upon reading several affidavits of the petitioner and of *John Hardham*, *Sir Thomas Aston* and Others, *John Crew* and Others, *Paul Daniel Chevenix*, *Dr. Francis Ascough*, *Robert Parsons* and Another, *James Cundell* and Another, *Joseph Emmott* and Others, and *Isaac Strutt*; the examination of *William Parsons* taken before the commissioners, under the said joint commission the 31st day of *January* 1738, and the articles of partnership dated the 10th of *October* 1734, between the said *Hubert* and *Nelson*, and also the indorsement on the said articles, and an account marked B. referred to in the deposition of *William Parsons*, the
several

several depositions of *John Hardham*, *William Thompson*, *Paul Whitehead*, *Edward Clarke*, *John Parr*, *Mary Carter*, and *Robert Parsons*, before the commissioners; and on hearing what was alledged by Mr. *Fazakerley* and Mr. *Noel* of counsel for the petitioner, and Mr. *Chute* and Mr. *Legg* of counsel for the assignees, his Lordship did order, that the petition of the said *William Hubert* should be dismissed; and the said joint commission against *Hubert* and *Nelson* did accordingly stand. This commission against *Hubert* depended upwards of two years. In *Trinity* term 1739, *Hubert* filed his bill in chancery against all the creditors under the joint commission, except one Mr. *Thomas Chesson*, for a discovery how their respective debts arose; and to controvert among other things his being a partner with the said *Robert Nelson*, or him, his estate, or effects being liable to the debts or demands of the same creditors or any of them; and after such suit had been some time depending, Mr. *Hubert* made an honourable proposal to the creditors, which they all thought proper to consent to; and upon payment of a certain sum into the bank of *England* in the names of trustees, the creditors entered into articles of agreement with *Hubert*, that they would accept the same in full

full satisfaction of their debts; and that they would not only procure the said commission of bankruptcy to be superseded, but also the said suit in chancery to be dismissed out of court without costs. The sum agreed upon was afterwards paid by *Hubert* and the suit was dismissed; and on the 12th day of *December* 1741, with the consent of the creditors, the joint commission of bankruptcy against *Hubert* and *Nelson* was superseded.

It therefore behoves every one upon entering into partnership to be very circumspect, and not too hastily form such a connexion with one who is a stranger; for it ought not to be forgotten that one partner may contract debts, even in the partnership itself, so far unknown to the other, as that the other may be involved in the danger of them, tho' he was not at all concerned in, or acquainted with them at the time they were contracted. So also may one partner discharge debts for the co-partnership firm, and if he has an evil intention, may receive money and give receipts for it on the joint account, but, not carrying it to the common account, or not bringing the amount into cash, may wrong the stock to so considerable a degree that it

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might

might eventually prove the ruin of all the partners.

An evil-minded partner might likewise confess judgment, or give bonds, or notes in the name, and on the account of the co-partnership firm, and yet convert the effects to his own private use, leaving the joint stock to be answerable for the value. Such an one might also clandestinely sell and give credit, and deliver parcels of goods to what value, or what quantity his evil-intention might suggest, and to whom he pleased, and by such connivance might lose to the stock so large a portion of the property as to ruin the other partners by involving the whole co-partnership firm in a state of bankruptcy; for certain it is that one partner may commit acts of bankruptcy without the knowledge of his co-partners, and thereby subject the joint-stock and all the partners concerned therein to the hazard of a commission, whilst the other partners might remain ignorant of it till the blow was given, and in such a manner, as to be too late to be retrieved.

Such being the dangers of partnership in trade, it cannot but be obvious how extremely
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necessary it is for every one to weigh the disadvantages, as well as the advantages of partnership upon entering into such a contract. And, in order to guard against the before-mentioned dangers, I shall next proceed to point out some of the principal requisites which are necessary to the carrying on partnership with good effect.

CHAPTER VII.

Partnership—
Carrying on.

WHEN we consider that commerce is not a game of chance, but a science, in which those who are best skilled bid the fairest for success; and when we also consider that *Great Britain* hath, by the force of her arms, the wisdom of her councils, and the integrity of her merchants opened a communication in all quarters of the world for an unlimited commerce, we are led to discover the *use*, if not the *necessity* of partnership to carry on commercial intercourse. And the primary ingredients which are requisite for the purpose of carrying on partnership with effect are a strictly moral conduct of the parties themselves, independant of any contract whatsoever, together with those positive as well as negative assistances which ought to be afforded by each of the partners in contracts to be made by them, and in all dealings and transactions throughout the joint concern; each ought likewise to abstain from what is prohibited by law
and

and not render his partner liable for the commission of any improper act, or the omission of any known duty; and a strictly just and regular account ought also to be kept and settled between them. For, when persons have entered into partnership with each other and become knit together as it were into a kind of brotherhood, “*Nam societas quoddam fraternitatis in se habet.*” It behoves each partner to exert so much of his activity and diligence, and to use such precaution in every transaction, as the value of the business in his judgment deserves, for, as partners are not always together when dealing, or perhaps seldom so, in the common concerns of business, it is absolutely necessary that the most implicit confidence and reliance should be placed in every one of the partners by each individually; and indeed the very nature of all partnerships whether express or implied, must be founded upon such reciprocal confidence: for by such rules alone can mercantile concerns be negotiated; and consequently the *slightest breach* of faith between them must in a moral sense be considered a violation of their contract. And to the honor of the *British* nation, this doctrine is invariably held good by the *English* merchants,

altho' it does not originate here; for *Cicero* in discoursing upon the subject of partnerships most emphatically says, "It is accounted a base thing to deceive a partner *in ever so small a matter*, and with reason. "For he who enters into partnership does it in hopes of gaining to himself an assistant: "To whom therefore can *he* fly for succour, "that suffers from *him* on whom he depended? Those crimes are of the blackest hue, against which there is the least guard. "We may defend ourselves against the malice of others, but to an intimate friend we lie open. For how can we provide against a partner, whom we cannot so much as suspect without violating our duty? Well therefore did our ancestors judge him who deceived his friend in this point, fit to be reckoned amongst the worst of villains."

^a Tully's words are, "*In rebus minoribus socium fallere turpissimum est neque injuriâ; propterea quod auxilium sibi se putat adjunxisse, qui cum altero rem communicavit. Ad ejus igitur fidem confugiet, cum per ejus fidem læditur, cui se commiserit? Atque ea sunt animadvertenda peccata maxime, quæ difficillime præcaventur. Tæli esse ad alienos possumus, intimi multa apertiora videant necesse est; Socium vero cavere qui possumus? Quem etiam si metuimus, jus officii lædimus. Recte igitur majores eum, qui socium fefellisset, in virorum bonorum numero non putarunt haberi oportere.*"

Orat. pro Roscio Amerino, chap. 40.

It has already been observed, that upon entering into partnership, which is a contract reciprocally beneficial to all parties, such care is exacted from each as every prudent man commonly takes of his own affairs; and in carrying on partnership, the partners owe reciprocally to one another an upright fidelity and integrity, such as may engage every one of them to share with the others whatever they have belonging to the co-partnership, with all the profits and advantages which may accrue from thence, and not to reserve any thing to themselves, but what they lawfully may by their contract. So, that besides the fidelity which the partners owe to one another, they likewise owe their care and attention for the affairs and effects of the co-partnership. But, inasmuch as their fidelity cannot be limited, for it admits of no bounds, they are obliged, with respect to the care which they owe, to use only the same application and vigilance in the partnership concerns, as they use in their own. And this duty of care and vigilance which the partners owe to one another being regulated by the care which they have of what is their own, it ought not to be construed to extend to the greatest exactness that the *most* careful and vigilant persons are capable of; but only to make them responsible

for all deceit, and for all gross faults; for, if a partner who takes the same care of the common affairs in carrying on the partnership, as he does of his own, should chance to fall into some slight fault without any evil intention, it would be unreasonable if he were to be made accountable for it; partners never being considered responsible for any accident, unless occasioned by some fault for which they ought to be answerable. It has been made a question, whether a partner, like a bailee, is accountable for fraud only, or whether he is also accountable for his negligence in carrying on trade? And it now prevails, that he is answerable for all the damages which happen through his *fault* ^b. But if a man fails in having used the *most exact diligence*, such a failure is not comprehended under the term *CULPA*, or *fault*: for a partner is not liable to answer damages, if, in regard to the goods of the partnership, it appears, that he has used the same care and diligence towards them, which he has usually observed in keeping his own individual property. For it is certain, that whoever chuses a negligent man for his partner, can lay the blame upon himself alone, and must impute his misfortune to his own ill choice ^c.

^b *Societas et rerum communio et dolum et culpam recipit.*
D. 50. 17. 23.

^c Inst. lib. 8. tit. 26.

In carrying on a partnership, where the stock, the firm, duration, the division of gain or loss, and other circumstances are fully ascertained: all the partners are generally authorised to sign by the name and firm of the company, because their interests are undivided^d, although their degrees of interest may differ; yet at the same time this privilege may be confined to some one or more of the partners by particular agreement. It often happens that the same partners carry on business at different places, in which case they sometimes vary their stile and firm.

After a partnership is entered into, and is begun to be carried on, the signature of each partner is usually sent to the correspondents, and so continue to be sent as new correspondents arise. And when a new partner is admitted, although there be no *public notice* of alteration in the firm, his signature ought to be transmitted, with an intimation of the change in the co-partnership to all their correspondents. Nevertheless, mercantile houses that have been long established, often retain the old firm, though all the original partners be dead or withdrawn.

^d Ante p. 2.

In carrying on partnership trade, the powers of each partner are in general discretionary; but at the same time partners ought not to act, in matters of importance, without consulting together, provided opportunity offers. For, though a partner is only bound to take the same care in a co-partnership dealing as he would of his own single concern, and may not be liable to make good the loss arising from his judging wrong in a case where he had *authority* to act; yet, if it can be made out that he *exceeded* his power, and the event prove unsuccessful, he must bear the loss: if it were otherwise, indiscreet partners might lead those with whom they were connected into the worst of difficulties against their consent.

Having endeavoured to trace out some of the chief requisites, as well as general rules necessary to the carrying on partnership with effect, it will be the business of the next chapter to shew by the several decisions in our courts what are considered to be the rights of partners as between themselves.

CHAPTER VIII.

As between Partners themselves,
Their Rights.

PARTNERS being seised *per my et per tout*, they must in all cases be considered as joint-tenants in the stock and all their effects; and not only of such particular stock, as may be in trade at the time of their entering into partnership, but throughout all the subsequent changes in their co-partnership dealings; consequently nothing can be considered as the *exclusive right*, or actual share of one partner, but his proportion of the residue, upon a balance being struck, of the accounts between them. To illustrate which doctrine I shall proceed to state, in the first place, the case of *Smyth v. De Sylva*^a, which was an issue directed out of the Court of Chancery, to try whether the plaintiffs, as assignees of *Edward Hague* a bankrupt, were entitled to *one third* part of the profits of the adventure of the ship *Unanimity*, from *London* to *Africa*, from *Africa* to *Jamaica*, and from thence to *London*, and also of the sale of the ship.

^a Cowp. 471.

This cause came on to be tried at *Guildhall, London*, at the Sittings after *Easter Term 1776*, before Lord *Mansfield*, when the jury found a verdict for the plaintiffs, damages one shilling, and costs forty shillings, subject to the opinion of the Court upon the following case :

That in *December 1771*, *Edward Hague* the bankrupt, together with the defendants *Isaac Bernal* and *Abraham Lara*, agreed to purchase and fit out a ship for the slave trade, at their joint expence, and for their *joint account* and risk in *thirds* : and that the other defendant, *De Silva*, should have the conduct and management of fitting out the ship as a purser or ship's husband, for the benefit of the parties concerned. That *Hague*, in *December 1771*, purchased the ship in question for 680*l.* and soon after gave a bill of sale of one third part to the defendant *Bernal*, and to the defendant *Lara* a bill of sale of one other third part : that soon afterwards the defendant *Lara* sold one moiety, or half-part of his third part, to the other defendant *De Silva*. That *De Silva* was at the whole expence of fitting out the ship for sea, and supplying her cargo, &c. amounting to the sum of 4658*l.* 15*s.* 1*d.* of which, the defendants *Lara* and *Bernal* duly

duly paid him their respective proportions : but *Hague* paid only 410 *l.* 11 *s.* 7 *d.* in cash, and gave two promissory notes, one for 403 *l.* 4 *s.* 5 *d.* payable at six months, the other for 739 *l.* 2 *s.* 4 *d.* at twelve months for the remainder. That *De Silva* paid in ready money towards the expence of the outfit, the sum of 1331 *l.* 14 *s.* 9 *d.* only ; and that he had six months credit for 1209 *l.* 13 *s.* 3 *d.* part of the outfit and cargo thereof, and twelve months credit for the remaining 2217 *l.* 7 *s.* 1 *d.* from the 1st of *January* 1772. That the said ship sailed for *Gravesend* on or about the first of *March* 1772, and arrived safe, &c. That before the promissory notes so given by the bankrupt became due and payable, and likewise long before the ship arrived at *Jamaica*, viz. on the second day of *July* 1772, *Hague* was declared a bankrupt. It could not be known for seven or eight months after, whether the ship would make a profitable voyage or not. The plaintiff *Nutt*, one of the assignees, applied several times to the defendant *De Silva* to take the bankrupt's share or interest in the said ship, and the profits and risk thereof to himself ; and to pay the plaintiffs the said sum of 410 *l.* 11 *s.* 7 *d.* being the money the bankrupt had actually paid on account thereof, which the defendant

De Silva at first refused: but endeavoured all he could to sell the bankrupt's share in the ship, and the outfit and profits thereof, to some other person, who would pay the 410 *l.* 11 *s.* 7 *d.* to the plaintiffs, his assignees, and to pay for the remainder of the outfit thereof: but not being able so to do, the defendants *Bernal* and *Lara*, about a month or two after the bankruptcy of *Hague*, were after much intreaty prevailed upon by the defendant *De Silva*, to join with him to take the remainder of the bankrupt's share, equally between them, and to pay the said 1142 *l.* 6 *s.* 9 *d.* between them in equal proportions, being the remainder of the money the bankrupt had agreed to pay towards the share thereof he had proposed to take. The defendant *Bernal* accordingly paid the defendant *De Silva* one third part of the said sum of 1142 *l.* 6 *s.* 9 *d.* and the defendant *Lara* paid him the other third part thereof; and the defendants, from that time, considered the plaintiffs (the assignees) as interested in the share of the ship, so to have been taken and paid by the bankrupt, only as the sum of 410 *l.* 11 *s.* 7 *d.* was to the sum of 4658 *l.* 15 *s.* 1 *d.* the amount of the costs and outfit of the said ship and cargo: and that the defendants were entitled to the remaining part of the share the bankrupt had originally

originally proposed to take. That the plaintiff *Nutt* pressed the defendant *De Silva* several times to pay the said 410*l.* 11*s.* 7*d.* and to take the same to himself, with the profits and risk thereof. That the first intelligence the defendant had of the ship having made a profitable voyage, was on the 24th *February*, 1773. The question was, Whether the assignees, as standing in the place of *Hague* the bankrupt, were entitled to one third, or to what other share of the profits of the adventure?

Mr. *Mansfield* for the plaintiffs; Mr. *Dunning* for the defendants.

Lord *Mansfield*, after stating the case, proceeded thus: The adventure having proved a profitable one, the question is, what share the assignees of *Hague* are entitled to; whether they are entitled to *one third* of the profits, and of the money arising from the sale of the ship, or only to the proportion which the sum of 410*l.* paid in money by *Hague* towards the expence of fitting out the ship, &c. bears to the whole amount of such original expence, which was 4658*l.*? There is no difference between the rule which must govern the determination of this case in a court

court of law or equity. It depends upon the right of the bankrupt: and to find out what the right of the bankrupt is, it will be necessary to consider *first*, how it stood at the time of the bankruptcy; and *secondly*, whether any alteration has happened since to vary such right. *First*, At the time of the bankruptcy, the whole expence was incurred. *Hague* was liable to *De Silva* for the amount of the notes and a partner in thirds. The adventure was then at sea, and *De Silva*, as purser or husband of the ship, was liable to him for the amount of his third share of the profits, whatever they might be. But suppose the other partners were liable to those who trusted *De Silva*; the consequence on a bankruptcy between partners is, that they are entitled as against each other to the balance of accounts; and so it was settled in the case of *Skip v. Harwood*, before Lord *Hardwicke*, in Chancery. Therefore; if the other partners had been obliged to discharge the amount of the notes which remained unpaid at the time of the bankruptcy, the assignees must have allowed the other partners the full sum paid for the bankrupt, and could have come against them only for the balance due to him, if any. This is not the case of a *new* trading, or a new adventure begun *after* an act of bankruptcy.

In

In *that* case, it is fair to say, that the bankruptcy dissolved the partnership: but here, all the expence was incurred prior to the bankruptcy; and if the bankrupt by an accession of fortune had had sufficient, and the voyage had proved a losing one, he would have been liable for the whole in proportion with the other owners. Therefore, he had clearly a *right* to a third of the profits at the time of the bankruptcy; and the insolvency of the bankrupt does not vary his right. *Secondly*, there has been nothing done since which can make the least variation: for every thing that has been done, was done without the privity of the bankrupt or the assignees. Consequently, their right cannot be varied by an agreement between other persons, in which they were not concerned. It is immaterial whether *De Silva* pledged his own credit only to the tradesmen, and took the separate credit of the partners for the share of each, or whether the other partners were liable to the tradesmen for the whole. The question is, what was the *right* of the bankrupt? If the other partners were not liable to *De Silva* for his share, yet the bankrupt, upon paying the full amount of his share, was entitled to a third of the profits, as he would have been liable to a third of the loss, if the adventure

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had

had been unprofitable. When I say upon payment in full, I mean payment according to law. If he had not become bankrupt, it must have been an actual payment of the whole of his share; but as he is become bankrupt, it must now be a payment according to the distribution made by law in that case; which is a proportionable dividend with the rest of the creditors. Therefore, whether it were a profitable or a losing adventure, cannot vary the right. The consequence is, that the assignees are entitled to one third of the ship and adventure in question.

Aston and Asbburst, Justices, of the same opinion.

Per Cur. Let it be indorsed on the *poslea*, that the assignees of the bankrupt are entitled to one third of the value of the ship, and of the profits of the adventure in question. And we find also the same principle established in a variety of other cases. Thus in *Heydon v. Heydon*, Mich. 5 W. & M^b. another person being co-partner with the defendant, a judgment was obtained against him, and all the goods of both of them were taken in execution.

^b Holt C. J. 302.

Holt C. J. and the Court adjudged that the Sheriff must seize all the goods, for the moieties are undivided; and if he seized but a moiety, and sells that, the other copartner will have a right to a moiety of that moiety; therefore he must seize the whole, and sell the moiety thereof, and then the vendee will be tenant in common with the other partner c.

See here in like case by *Holt* C. J. d. Although partners have joint and undivided interests, yet only the share or part of him against whom execution is sued, and no more, can be seized upon this execution.

And likewise in the case of *Bachkurst v. Clinkard, Mich. 2 W. & Me.* Case against the defendant as Sheriff of *Kent*, reciting a judgment at the plaintiff's suit against *William Dykes*, for 400 *l.* and a *fiery facias* thereon delivered to the Sheriff, that though *Dykes* had divers goods and chattels, yet he had neglected to seize them, and made a false return of *nulla bona; non cul.* Pleaded on a trial before the Lord Chief Justice *Holt*. The case was thus: *Dyke, Brown* and others were

c 4 Bac. Abr. 460. Salk. 392.

d 1 Show. 173, 174. Comb. 217.

e Holt 643.

partners of several goods of great value: *Brown* being indebted, a *feri facias* was sued against him, and thereon these goods were all seized, and in the Sheriff's custody, and consequently not liable to the plaintiff's execution. Held by *Holt C. J.* that being once seized in a custody of law, they could not be seized again by the same or another Sheriff; and if they were sold thereon, such bargain would be void. Held also that though they had joint and undivided interests, yet only the share or part of *Brown*, and no more, could be seized upon the execution against *Brown's* goods; and consequently *Dyke* had goods; and so the return was false, and verdict and judgment for the plaintiff.

Holt C. J.— The Sheriff has no power to receive money from the defendant upon a *capias*; his business is only to execute his writ: and if in such case the Sheriff after became insolvent, and do not pay the plaintiff, such payment shall not excuse the defendant. If Sheriff suffer one execution to escape, the plaintiff has his election to sue the Sheriff upon the escape, or else the defendant, but he cannot have a *capias* against the defendant without a *scire facias*.

So in *Eddie* against *Davidson* f. In this case the *defendant* was partner with one *Birnie*, against whom a commission of bankrupt had issued, but, before the bankruptcy, the *plaintiff* had sued out execution on a bond of the *defendant's* for 700 *l.* and the Sheriff had levied on the partnership effects. *Bernie's* assignees obtained this rule, to shew cause why the Sheriff should not pay them a moiety of the money arising from the sale of the goods so taken in execution, upon an affidavit of *Bernie's*, that he was entitled to an equal share of the partnership effects, as partner with *Davidson*. The *plaintiff's* affidavit, on shewing cause, denied that *Bernie* had an equal share in the partnership effects, and stated that he had embezzled the joint-stock to a considerable amount.

The Court directed that it should be referred to the Master to take an account of the share of the partnership effects to which *Bernie* was entitled; and that the Sheriff should pay a part of the money levied, equal to the amount of such share, to the assignees.

f Douglas 650.

Thus where two joint-partners are in trade. Judgment was entered against one of them. And upon a *feri facias*, all the goods, being undivided, were seized in execution. And upon application to the King's Bench by him against whom the judgment was not, the Court held, that the Sheriff could not sell more than a moiety, for the property of the other moiety was not affected by the judgment, nor by the execution. *Jacky v. Butler* g. And the same principle is also adhered to in the case of *Richardson v. Goodwin* h; where *Richardsons* senior and junior, and one *Janson* were partners together in trade, and *Janson* embezzled and wasted the joint stock, and contracting private debts became a bankrupt. The Court seemed to think, that out of the produce of the goods, the debts owing by the joint trade ought to be paid in the first place, and that out of *Janson's* share, satisfaction must be made for what *Janson* had wasted or embezzled; and that the assignees could be in no better case than the bankrupt himself, and were entitled only to what his third part would amount unto,

g 2 Ld. Raym. 871. Comb. 217. S. P. 3 P. Wms. 25. Vide 12 Mod. 446.

h 2 Vern. 293.

clear after debts paid, and deductions for his embezzlement.

And this rule has been since confirmed by a decree of Lord *Talbot's*. *Goss v. Dufresnoy*ⁱ.

A bill was brought, setting forth that *Goss*, *Neaulme*, *Gromvegan* and *Prevost* became partners. That *Prevost* was intrusted with the goods in the shop and warehouse, but became profuse, and embezzled the partnership stock, and applied the same to his own use, and suffered the partnership debts to be unpaid; and having contracted private debts on his own account, became a bankrupt, and a separate commission was taken out against him.

A question was raised, whether *Prevost's* share of the partnership stock ought to be applied, in the first place, to pay what he was indebted to the partnership?

Lord *Talbot* ordered an account of what *Prevost* had embezzled of the partnership estate, and that the partnership debts should in the first place be paid to the joint-creditors in proportion to their debts, and as far as the

ⁱ Davies 371.

partnership estate will extend; and that if any of the partnership estate remains, after the joint-debts are paid, then the same to be divided, and the partnership to be paid out of *Prevost's* share what he had embezzled.

Therefore if one partner dies, though the debts and effects survive, yet the survivor is considered in equity barely as a trustee for the representatives of the deceased, upon which footing the accounts must be taken, and nothing considered as the share of the survivor till afterwards, because of the continuance of the property in the stock to the representative of the deceased partner, who has a specific lien thereon, although the survivor afterwards dies or becomes bankrupt.

And if the partnership is dissolved by consent, that does not determine the legal interest, which continues as before; so that the property of the stock of the partner so going out, is not divested thereby, but he remains equally entitled as joint-tenant with the other; and in a bill for an account, the stock would be subjected for his satisfaction. And as between one partner and the separate creditors of the other, they cannot affect the stock any further than that partner could, whose creditors they are.

Thus

Thus in the case of *West* and *Skip*^k, where a partnership was entered into in a brewery, between *Skip*, and *Ralph* and *James Harwood*, and particular terms then agreed on between them, that *Skip* should have such a proportion of the out-standing debts, and a lien and security on the partnership stock, to make that share of those debts good to him according to the value set on them, with penalty in case of a breach. After this some differences arose between them on a suggestion that *Ralph Harwood* drew more than he ought out of the stock, and received debts without the privity of *Skip*, with several other breaches of covenant and misbehaviour; which produced an action by *Skip* for the penalty of the articles; in which a judgment was recovered: but before execution thereon, *Ralph Harwood* confessed a judgment to his sisters; who took out execution by *elegit*, and laid hold of the partnership stock, which was assigned by the Sheriff. *Skip*, insisting that this was a fraudulent act to cover the effects, took out a commission of bankruptcy against *Ralph Harwood*: upon whose application to supersede it, issues were directed to try whether he was a bankrupt or not at the time of the commis-

^k 1 Vezey 242.

sion. But instead of trying it, the partners came into a rule by consent, by order of *Nisi Prius*, which was afterwards made a rule of C. B. and which order was, that *Ralph Harwood* should execute a bond with penalty to *Skip*, and procure two other bonds with penalty conditioned to pay to *Skip*, what should be due to him on the day of the date of the order, with the interest; and ordered with like consent, that the partnership should cease as on that day, and the account of the partnership trade should be carried on to that day, and no farther: and that upon *Ralph Harwood's* giving such security as before mentioned, the commission should be superseded, the officers discharged, and the effects delivered. Under this order nothing effectual was done; the whole thereof depending upon *Ralph Harwood's* giving the security therein mentioned; which he not performing, motions were made in C. B. for attachments against him for contempt in breaking this rule; which, being found to be only a personal remedy with no effect, produced an application to Chancery under the commission of bankruptcy: and by consent of the parties it was ordered, that the rule of C. B. should be discharged, except so much as related to the dissolution of the partnership; and ordered

dered to restrain *Harwood* from disposing of any of the effects except in the way of trade; and that it should be tried again. On the trial a verdict was found, that at the time of issuing the commission *Harwood* was no bankrupt; and ordered, that the commission should be superseded. *Skip* filed a new bill in this court, setting forth all this; praying an account and satisfaction for the breaches of covenant, and to be paid what was due to him out of the goods and effects taken in execution; and that the defendant might be restrained from getting in the partnership effects to his prejudice. The cause was put off several times, that *Harwood* might find security, to prevent the appointing a receiver. But upon his not doing it a decree was made, and a receiver appointed. It appeared afterward, that *Harwood* had endeavoured to secrete the effects in a very extraordinary manner during the hearing of the cause, after the propositions made to him, and time given him to comply therewith; getting in the debts, and giving receipts where nothing was paid; which produced a commission of bankruptcy by other creditors eight days after making the decree: and these acts of *Harwood*, done really to elude the decree and appointment of the receiver, were now set up

up as acts of bankruptcy. This occasioned new contests, and a new bill by the assignees, insisting that *Skip* has no property either legal or equitable against them: but that his debt ought to be levelled with all the other debts of *Harwood*: and he be considered barely as a creditor. And *Skip* brought a bill to have the partnership estate first disposed of for his satisfaction: and that nothing should be considered as belonging to the *Harwoods* till after that deduction: and to carry on the former decree.

Lord Chancellor.—The main, if not the only question is, first, whether *Skip* has any interest in, or specifick lien upon this stock; Another and very different question, (though it has not been treated as different at the bar) is, Whether the sisters, defendants to both bills, are to be considered, as between them and the assignees, as having any interest in, or specific lien upon this stock; the first decree having considered them, from the time of the *elegit*, as partners; the first must be considered in two lights; first, whether *Skip*, as between him and the *Harwoods*, is to be considered as having any specific interest at the time of the commission. Secondly, supposing he had, whether any thing happened
to

to vary that right, as between him and the assignees; particularly whether this specific lien is gone by the 21 *Jac.* 1. c. 19. and these goods to be considered as the effects of the bankrupt, to be distributed among all the creditors. As to the first, it is insisted, that from the dissolution of the partnership by the order of *Nisi Prius*, *Skip* had parted from or varied his specific lien in the goods; and had resorted by consent to take personal security for his demand; and that however that be as to the old stock, yet as to the new, he certainly can have no specific property, interest, or lien thereupon. It is necessary to consider what kind of lien *Skip* had originally, as between him and the other partners: then how it was after the dissolution: then how it would have stood, if the question had arisen between the representative of a partner and surviving partner; as that will go a great way to determine the other. The partners themselves are clearly joint-tenants in the stock and all effects: not only that particular stock in being at the time of entering into the partnership; but to continue so throughout; whatever changes might be made in the course of trade. Otherwise it is impossible to carry it on. And being seized *per my et per tout*, when an account is to be taken,

taken, each is intitled to be allowed against the other every thing, he has advanced or brought in as a partnership transaction, and to charge the other in the account with what that other has not brought in, or has taken out more than he ought: and nothing is to be considered as his share, but his proportion of the residue on balance of the account. That this is so at law, appears from two cases, 2 *Ld. Raym.* 871. and *Heydon v. Heydon*, *Salk.* 392. where it was held, that judgment and execution against one partner for his separate debt does not put the other in a worse condition; for he must have all the allowances made him before the judgment creditor can have the share of the other applied to him. So if one partner had died, the debts and effects survived: but yet the survivor is considered in this court barely as a trustee for the representatives of the deceased; upon which footing the account would be taken, and nothing considered as the share of the survivor till afterward: which is from the continuance of the property in the stock to the representative of the deceased partner, who has a specific lien thereon, although the survivor afterward dies or becomes bankrupt. So if the partnership was dissolved by consent; as in this case, that determines

termines not the legal interest, which continues as before; so that the property in the stock of the partner so going out is not divested thereby, but he remains equally intitled as joint-tenant with the other; and in a bill for an account the stock would be subjected for his satisfaction. Then as between one partner and the separate creditors of the other, the law and those two cases before-mentioned say that they cannot affect the stock any farther, than that partner could, whose creditors they are. It is objected, that all this is allowed by the rule, by which *Skip* consented to determine the partnership, and that personal security should be given; which is a waving his property, and resorting to personal security: but that is a most strained construction, and there is nothing in the rule to import it. The price to be paid for *Skip*'s share remained to be settled, and the bond for payment was never executed; *Harwood* having trifled and performed no part. It is impossible therefore to consider *Skip* as parting with his lien upon this stock by this rule, when nothing was done toward carrying it into execution. But the subsequent proceedings shew, that *Skip* insisted on it, viz. his bill, and the order was made to restrain *Harwood* from disposing of his effects;

fects; for which order there would be no ground, had *Skip* been considered only as a separate creditor, and not as having a specific lien. But the more material consideration is, whether any, and what alterations is made by these acts of bankruptcy, and the commission thereon; which shall now be taken for granted to have well issued, and to have been acts of bankruptcy, without entering into that question. And to shew that in point of law and equity such an alteration has been, and thereby *Skip* has lost his specific lien, the clause in 21 *Jac.* 1. c. 19. is insisted on: the construction of which clause has been much controverted and argued in the case of *Ryal v. Rowles*; which case yet waits for the opinion of the Judges; and therefore I at first doubted, whether it should not wholly stand over, till that resolution is given. But on consideration I think, I can form an opinion (at least to satisfy myself) without prejudice to any question, that may arise in that case; of which this will stand clear. First observe, that this is not a case strictly within the words of the preamble of that clause; which is a description only of goods and effects of the bankrupt himself, consigned by him to another, who suffers them to be left in the possession of the bankrupt. And in *L'Apôstre v. Le*

v. Le Plaistrier, cited in 1 *Wms.* 318. it was held by *Holt* C. J. that the enacting clause should be explained by the preamble; but my opinion shall not be founded on that. This case clearly, according to *Holt's* opinion, would not be within this clause; for *Skip's* share was his own; not being assigned by him to *Harwood*; nor within the preamble. But I will not determine a point, in which such great Judges differed; as Lord *Cowper* did, with some warmth, from *Holt*, in the case of *Copeman v. Gallant*, 1 *Wms.* 314. nor is it necessary.

But what I found myself upon, is, that by the enacting clause to subject goods to the creditors of another person, those goods at the time of bankruptcy should be left in the possession, order or disposition of the bankrupt; so that he might take upon himself to sell or dispose as owner: and there has been no case upon this act, or ever will be, wherein a court of law or equity will do so severe a thing as to subject the property of one to the debts of another, without proof of the consent of the real owner to leave them in the power of the bankrupt (possession not only being sufficient) or a *laches* in letting them remain there, so as to gain him a false credit.

The contrary of which appears here; for it is impossible to take more methods to prevent it, than *Skip* did; the evidence being that there is no such implied consent, especially as there was no execution by *Harwood*. Nor do I found myself on the notion of a *lis pendens*; which, it is insisted for *Skip*, subsisted at the time of the bankruptcy, by the bringing his bill, so as to be sufficient notice; which question I would not willingly determine, because there is no case, where this court has determined the property of goods to be affected by reason of a *lis pendens*, where possession is the principal evidence of ownership, as of personal chattels, which might be of dangerous consequence: though as to real estate it may be otherwise. But what I go upon is, that this case is not within the act of Parliament: therefore if the question arose on the case of the mortgage of goods, or an absolute sale, and the vendor did not deliver them at the time appointed, but on trover against him kept the vendee at arms length, and in the mean time became bankrupt; this would not be considered as a leaving the goods by vendee in the possession of the bankrupt within the act; the vendee having done every thing in his power to get the possession from him. So if a mortgage (which is the
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case of *Ryal v. Rowles*) of goods, which are contracted for and agreed to be delivered into the party's own hands, or the key of the warehouse (which in bulky goods is all that can be done) but no such delivery is made; and a bankruptcy follows; *detinue* having been brought for them, they would not be considered as left in the possession of the bankrupt; the pursuit in a court of justice excluding any actual or presumed consent. Farther still: suppose a partnership determined by effluxion of time; one intends to continue the trade, the other will not, insisting upon a division; and on non-compliance brings an action at law, or a bill in equity for an account, and to restrain the disposing of those goods, the possession of which is wrongfully kept from him by his partner; who pending this becomes bankrupt: this would not be within the statute.

Skip therefore is intitled to the same specific lien against the assignees as against *Harwood*: and that even as to the new stock; for in all those cases of a lien on a partnership it is not considered as appropriated to the stock brought in, but to every thing coming in lien during the continuance or after the determination of the partnership. As in *Bucknal v.*

Roiston, Prec. Chan. 285. where a lien was held to be on those goods, which were the produce of the original goods. So in *Brown v. Heathcote*, *Mich.* term 17₄₆, I held, that it continued, on what was the produce by way of barter and sale: and that holds much more strongly in the case of a partnership trade which cannot otherwise be continued. It is said, that the acts of Parliament relating to bankrupts intended to level these specific liens, as they do judgments unexecuted: but that is because of the express words of the act of Parliament, that judgments unexecuted should be levelled; for otherwise they would continue specific liens. Another question is between the assignees and the sisters; in which arises a difficulty in respect of the penning of the former decree; which could not then be foreseen; as then no bankruptcy had taken place, and the *Harwoods* themselves were partners. The sisters insist on two specific liens; first by the inquisition taken by the *elegit*; secondly by assignment of the officers of excise when the effects were seized. Upon which a very different question arises, as between the assignees and the sisters, from what it was between *Skip* and the sisters; for as against *Skip* the sisters could only affect the share of *Harwood*, on the au-
thority

authority of *Heydon v. Heydon*, and 2 *Ld. Raym.* 871. It was immaterial to *Skip* to enter into the question, whether they are general creditors or not: but as the assignees can only affect a share of that share, it may be very material to them, whether the sisters have gained a preference by those two liens. And that may be influenced by the opinion of the Judges in *Ryal v. Rowles*: for the sisters on the *elegit* do not take possession of the goods but leave them absolutely with the *Harwoods*. The question therefore arises, whether by this clause they are not excluded, being either a plain consent or great *laches*: and it holds more strongly against a creditor by execution than any other; for if a creditor by *feri facias* seizes the goods of the debtor, and suffers them to remain long in the debtor's hands, and another creditor obtains a subsequent judgment and execution: it has been determined often, that it is evidence of fraud in the first creditor, and the goods in the hands of the debtor remain liable. As to them therefore the point shall remain till the determination of that question. The bill therefore must be dismissed, so far as it seeks to come upon the specific lien of *Skip*; but in justice to the assignees, the other question must be reserved: and if by the determina-

tion of *Ryal v. Rowles* I should think, the sisters have lost their specific lien, I may come at it by varying the former decree; considering them, instead of partners, as gaining a lien, but as having lost it by *laches*, and to receive a dividend as general creditors of the *Harwoods*. The only difficulty objected is, that on a bill to carry a former decree into execution, the Court can only do that, and not vary; and the general rule is so. But there are several instances wherein the Court has considered the directions, and whether there was any mistake: as has been done by Lord *Cowper*, to attain the justice of the case; and may be done here, especially as between new parties.

And the same rule was recognized and adhered to by Lord *Thurlow* in the case of *Hankey* against *Garratt*¹. And afterwards confirmed by Mr. Justice *Buller* (in the same case) sitting for his Lordship, *November 29, 1792*; which case is reported as follows:

Wooldridge and *Kelly* were partners in trade, and failed in 1777, and *Kelly* then residing in the *Danish* island of *St. Thomas*, a

¹ 3 Bro. 457.

commission of bankruptcy was issued, dated 10th July 1777, against *Wooldridge*, by the description of *Thomas Wooldridge* of the *Crescent*, London, merchant, in partnership with *Henry Kelly*, late of the same place, merchant: *Holland Pope* and *John Hawkins* were chosen assignees. *Pope* died soon after, and *Hawkins* became insolvent in 1779. In 1780 the defendants *Garrat* and *Rowlatt*, were chosen assignees, and received from *Pope's* representatives and from *Hawkins* a considerable sum of money arising from the joint property of *Wooldridge* and *Kelly*. Afterwards an action was brought against *Kelly*, on which he was outlawed, and a joint commission was issued against both, (tho' *Kelly* was abroad, and had committed no act of bankruptcy) but this outlawry was afterwards reversed, and the commission superseded.

The assignees having in their hands about 3000*l.* or 4000*l.* in April 1784, and in December 1787, petitions were presented by joint creditors, praying for a dividend; in consequence of which, and an order for that purpose, the commissioners ordered a dividend of 1*s.* in the pound, to be paid out of the separate effects of *Wooldridge*, and out of a moiety of the joint effects of *Wooldridge* and

Kelly; but refused to divide the other moiety of the joint effects, conceiving that their jurisdiction did not extend to it. A few months after, the assignees having received between 2 and 3000*l.* more, another petition was presented for the purpose of obtaining Lord Chancellor's order for the division of the whole, which came on to be heard in *January* 1789, when his Lordship being of opinion, that he could not make such order on a petition, recommended that a bill should be filed, and dismissed the petition. In consequence of this the present bill was filed 31st of *January* 1789, and after several delays and answers put in, exceptions taken, &c. final answers came in 20th *January* 1790, by which they admitted the sums come to their hands, but with respect to the uses made of them from time to time, (which was particularly interrogated to in the bill) *Garratt* admitted the money in his hands had been lent to his partners, and that he was paid interest for it at 5 *per cent.* to the amount of 695*l.* 11*s.* 9*d.* *Rowlatt* said he had also lent the money he received to his partnership, but had been paid no interest for it. After the original bill filed, *Kelly* died, leaving his sister Mrs. *Wooldridge*, (the widow of *Wooldrige*, who was also dead) his nearest relation, who administered

ministered to him; and the bill being amended, and she made a party, by her answer claimed the property in question, as his representative, and also as a bond creditor. The cause coming on to be heard in *Michaelmas* term 1790, Mr. *Hardinge* for the plaintiffs: There are two questions.

1. Whether the assignee can compel the administratrix to pay the joint estate to them?

2. Whether a separate bond creditor can come in before the joint creditors are paid?

In the present case the joint estate has been applied by the assignees for their own benefit. This is a clear ground for interest at the usual rate: for it has been determined, that wherever trustees have made use of trust money, they shall pay interest for it at the usual rate; without reference to what interest they have actually made: and the delay used in this case will be a sufficient reason for the defendants to pay the costs. The assignees objected to any dividend beyond the moiety of the joint effects; the bill prays a division of the whole fund.

Here

Here is a joint fund got into the hands of separate assignees; out of whose hands it cannot be taken, but by the joint creditors. Mrs. *Wooldridge* claims it for the purpose of paying *Kelly's* separate creditors; so that it is a question between the joint and separate creditors. It so happens that one of the separate creditors is administratrix; but the only effect that can have, is between her and the other specialty separate creditors. Then it is *Kelly*, by his administratrix, claiming against the joint creditors. What is a partnership? Partners are joint tenants of the joint fund; the consequence is, that one can retain the whole fund; the one has no claim on the other but upon the settlement of accounts. *Fox v. Hanbury*; *Cowp.* 448. *Smith v. De Silva*, *Cowp.* 469. Suppose *Wooldridge* had paid the joint debts out of the fund, *Kelly* could not have recovered but on an account. As between a surviving partner and the representative of the deceased partner, the survivor at law has the whole right, though he is a trustee; but he acts fairly if he pays all the joint debts, and pays over a moiety of the surplus. Here the assignees are tenants in common of one moiety, and, by chance, they have the other moiety in their possession, but they must pay

pay it to the joint creditors, as appears by the principles laid down in *West v. Skip*, 1 *Vezey* 242. There is no case in the books in point with this, but the principle is laid down in several cases. In *Goss v. Dufresnoy*, stated 1 *Cooke's Bankrupt Law* 289. the partnership debts were ordered to be first paid. Mr. Solicitor General and Mr. *Mansfield* (for the assignees). The commission was, to all intents, a separate commission, but joint debts were proved under it. *Kelly's* moiety of the joint fund is a fund not to be distributed under the bankruptcy. If *Kelly* had received the moiety, and paid separate creditors with it, the payment would be good. There is a real difficulty, in this case, as to *Kelly's* moiety of the fund. The assignees have distributed the moiety among the creditors, but did not think themselves entitled to distribute the remaining moiety during *Kelly's* life. It was *Kelly's* money in their hands, and he could not have made them pay interest, as they were only his simple contract creditors. They were persons not interested (being not even creditors) appointed by the creditors to get in the fund, and have kept the money by necessity; they ought not, therefore, to pay interest: and as the suit was made necessary by the doubts entertained, they should not pay costs.

costs. Mr. *Graham* rising on behalf of Mrs. *Wooldridge*, the administratrix, Lord Chancellor stopped him, saying, that the point would be reserved to him, whether the separate creditors were first to be paid out of the moiety before the joint creditors. His Lordship said, that where one partner is solvent, and the other bankrupt, the assignees can do no justice without dividing the joint estate among the joint creditors; for they are joint tenants of the whole, if they can get it in. It was referred to the Master to take an account of the joint estate of *Wooldridge* and *Kelly*, and of the separate estate of *Wooldridge* come to the hands of the defendants the assignees, and to the hands of the defendant *Susannah Wooldridge*, as administratrix of *Kelly*, and to enquire whether the respective partnerships of the defendants *Garrat* and *Rowlatt*, had paid them any interest for such parts of the estate of *Wooldridge* and *Kelly* as came to their hands; and that they should be charged with such interest, and that the Master should compute interest at 4 *per cent.* on the rest of the money which came to their hands from the time of their receiving the same; and the Master was to enquire what creditors had sought relief under *Wooldridge's* commission, and which of them were joint creditors, and whether

whether any of the joint creditors had not proved, and his Lordship declared, that the joint creditors of *Wooldridge* and *Kelly* were to be considered as creditors on their joint estate, and that the assignees should pay the 3176 *l.* 14 *s.* 4 *d.* admitted to be in their hands, into the bank, and the same should be laid out in trust in the cause; and reserved further directions, till the Master should have made his report. Upon the 29th *November*, the Master made his report, and thereby certified, that he had taken the accounts as directed; and that it was admitted before him, that there had come to the hands of defendants *Garratt* and *Rowlatt*, of the joint estate of *Wooldridge* and *Kelly* (including a sum of 450 *l.* 18 *s.* 5 *d.* arising from the separate estate of *Wooldridge* as after mentioned) the sum of 6764 *l.* 1 *s.* 5 *d.* and that they had expended, on account of the joint estate, sums amounting to 3199 *l.* 13 *s.* 2 *d.* which left a residue in their hands of 3564 *l.* 8 *s.* 3 *d.* and that it was admitted, there had come to their hands of the separate estate of *Wooldridge* the sum of 450 *l.* 18 *s.* 5 *d.* which made part of the money received by the defendants from *Pope* and *Hawkins*, the former assignees of *Wooldridge*, and which had been divided among the creditors who had proved under

Wooldridge's commission, and that there was not any thing remaining in the hands of the defendants *Garratt* and *Rowlatt*, of the separate estate of *Wooldridge*, except five treasury orders of 100*l.* each, bearing an interest of 3*l.* 10*s.* *per annum*, taken in pursuance of the acts for giving relief to *American* sufferers, to *Susannah Wooldridge*, and the defendants *Garratt* and *Rowlatt*, jointly; and that the defendant *Susannah* had not in her possession any part of the joint or separate estate. He then found that defendants *Garratt* and *Rowlatt*, had on the 15th *March* 1791, paid the sum of 3166*l.* 16*s.* 4*d.* into the bank, (which had been laid out in the purchase of 3897*l.* 12*s.* 6*d.* Bank 3*per cent.* annuities), and which being deducted out of the balance in their hands, the same was reduced to 397*l.* 11*s.* 11*d.* and it was admitted before the Master, that the partnership in which the defendant *Garratt* was concerned, had paid him interest for such part of the joint estate of *Wooldridge* and *Kelly*, as had come to his hands, 695*l.* 10*s.* 9*d.* which was all the interest made by defendant *Garratt*, of the joint estate, at the time of paying the money into the Bank; and that the defendant *Rowlatt* had been paid, from the co-partnership in which he was concerned, for interest on
such

such part of the joint estate as had come to his hands, 309 *l.* 19 *s.* 10 *d.* which was all the interest made by him, at the time of the payment made into the Bank; and he certified that he had computed interest on the remaining sum of 397 *l.* 11 *s.* 11 *d.* the balance in the hands of defendants *Garratt* and *Rowlatt*, from the 3d *March* to the 29th *November*, and the same amounted to 11 *l.* 14 *s.* 8 *d.* and that he had, in the 3d schedule to his report, set forth an account what joint creditors had proved under *Wooldridge's* commission, and the sum proved by each, and the dividend paid to each, and that one person only who had not before proved, *Andrew Verrier*, had come in before him, and proved a joint debt of 22 *l.* 19 *s.* 6 *d.* and that no sums of money (except the dividends) had been received by the said joint creditors.

The cause came on for further directions on the Master's report, on the 8th *February*, before Mr. Justice *Buller*, sitting for the Lord Chancellor, when Mr. *Graham* shortly argued on the part of Mrs. *Wooldridge*, that she was entitled to a priority with respect to the second moiety of the joint estate; and that the assignees could only divide one moiety among the joint creditors. But Mr. Justice *Buller*
thought

thought the assignees must administer all the joint assets in payment of the joint creditors; and that Mrs. *Wooldridge* had no priority against them, and, therefore, referred it back to the Master to tax all parties their costs, and ordered the 3897 *l.* 12 *s.* 6 *d.* standing in the name of the Accountant General, in trust in the cause, to be sold, and that the money to arise from the sale, together with the cash in the Bank, and the interest upon the 3897 *l.* 12 *s.* 6 *d.* until the sale, should be paid to the defendants *Garratt* and *Rowlatt* the assignees, who were to apply the same, together with the 1408 *l.* 17 *s.* 2 *d.* reported due from them, in payment, first of the costs, and then to divide the residue *pari passu* among the creditors named in the third schedule to the Master's report, and to *Andrew Verrier*, a creditor who had proved a debt before the Master; and, by consent, it was ordered that the five debentures mentioned in the report to be in the hands of the assignees, should be delivered up to the defendant *Susannah Wooldridge*.

And after a dissolution of partnership, the right in law and justice which one partner has against another, according to the *dictum* of Lord *Mansfield* ^m, "clearly is not to change

^m Cowp. 449.

" the

“ the possession, or to make an actual division of specific effects.” One partner may be a creditor of the partnership to ten times the value of all the effects.

The other partner in that case can only have a right to an account of the partnership, and to the balance due to him, if any, on that account. For no person deriving under the partner can be in a better condition. And, if one of two partners become bankrupt, the solvent partner may, if for a valuable consideration and *without fraud*, dispose of the *partnership* effects; and if *he* afterwards fail, the assignees under a *joint* commission against *both*, cannot maintain *trover* against the *bonâ fide* vendee of such partnership effects. Thus in the case of *Fox et al*’ assignees v. *Hanbury et al*’ⁿ where upon a rule to shew cause why the arbitrator named in an order of *Nisi Prius* made in this case, should not be directed to settle, in his award, the account of the consignments of tobacco to the defendants, proved on the trial, from the time of the bankruptcy of *Thomas How Ridgate*; the case, as reported and stated by Lord *Mansfield*, appeared to be as follows:

ⁿ Cowp. 445.

This was an action of trover brought by the plaintiffs as assignees under a joint commission of bankrupt, taken out against *John Barnes* and *Thomas How Ridgate*, bankrupts, to recover 4000 hogsheads of tobacco. The declaration consisted of two counts: one charging the trover and conversion to be before either of the bankrupts had committed an act of bankruptcy: the other charging it, subsequent to an act of bankruptcy committed by both the bankrupts.

Barnes and *Ridgate* were partners; *Ridgate* lived in *England*, and *Barnes* lived in *Maryland*.

Ridgate was under very large acceptances, and much pressed for money. To support his credit *Hanbury* agreed to pay, and actually did pay, several bills for him.

But with a view to better carrying on the business, *Ridgate* was to go to *Maryland*, and *Barnes* was to come to *England*; *Hanbury* interposed his credit, upon the confidence of consignments of tobacco being made to him, which would be a pledge for the monies he advanced.

Ridgate

Ridgate told his clerk that he was going to *Maryland*, and that *Barnes* would come over to *England*; but bid him say, the day he set out, that he was gone to *Hanbury's* country house, and would return soon. *Mauduit* a creditor called, and had that answer. *Ridgate* went to *Maryland*, and *Barnes* came to *England*. No umbrage was taken by the creditors at this exchange of the residence of the two partners: neither *Ridgate*, *Barnes*, or *Hanbury* had an idea that this exchange of residence was an act of bankruptcy. There was no intention to commit an act of bankruptcy.

Consignments of tobacco were made by *Barnes* to *Hanbury*, before *Barnes* left *Maryland*, and there were other consignments afterwards. Upon the 22d of *January* 1773, *Barnes* after returning to *England* committed an act of bankruptcy, and afterwards publicly failed. Then and not before, the creditors set up *Ridgate's* going to *Maryland* as an act of bankruptcy by him, and they took out a joint commission against both: and the plaintiffs, in the capacity of assignees under the commission, brought the present action.

Whether *Ridgate's* going to *Maryland*, under the particular circumstances before-mentioned, should be construed an act of bankruptcy, was a question much litigated at the trial. The jury upon the misrepresentation to *Mauduit* before-mentioned, were of opinion it was; and accordingly found him a bankrupt upon the 15th of *July* 1772, the day on which he left *London*. No fraud or want of consideration was fixed upon *Hanbury*. But the plaintiffs insisted, that all the consignments after the 15th of *July* 1772, were void. The defendants insisted, that all the consignments before the 22d of *January* 1773, were good. There were consignments after the 22d of *January* 1773, which the defendants could not support; and therefore as to them, an account was necessarily to be taken of the value of the tobacco, which so came to the hands of the defendants, after making just allowances. That account was referred to an arbitrator; and the question, whether the plaintiffs were entitled in this action, to recover the whole of the value of the consignments made by *Barnes* between the 15th of *July* 1772, and the 22d of *January* 1773, or a moiety thereof, was submitted to the opinion of the Court: and accordingly to such opinion, such consignments are to stand or fall,

fall, and to be brought into, or left out of the account, by the arbitrator.

This case was argued twice, first in *Hilary* Term last by Mr. *Wallace* and Mr. *Buller* for the plaintiffs, and Mr. *Mansfield* and Mr. *Dunning* for the defendants. The Court then ordered it to be argued by one counsel on each side, this Term. It was accordingly argued by Mr. *Buller* for the plaintiff, and Mr. *Mansfield* for the defendant.

Mr. *Buller* for the plaintiffs insisted, 1st, That the consignments were fraudulent, being with a view to give the defendants a preference, and therefore void for the whole. 2dly, If not void for the whole, the plaintiffs were at least entitled to a moiety: for by the bankruptcy of *Ridgate*, the partnership was immediately dissolved; and so it was held by Lord *Mansfield* and *Tates* Justice, in the case of *Hague* and others, assignees of *Scott* against *Rolleston*, 4 *Bur.* 2174. If so, *Barnes*, the solvent partner, had no longer a power over the whole, but each had his own moiety only to give or grant. If an execution issue against one of two partners, the Sheriff, though he may seize the whole, can only sell an undivided moiety. *Heydon v. Heydon*, 1 *Salk.* 392.

By the same rule, a bankruptcy severs from the time; for a bankruptcy is an execution in the first instance. From the moment, therefore, that *Ridgate* failed, the power of *Barnes* to bind the whole of the partnership effects ceased; consequently, the plaintiffs were entitled to a moiety.

Mr. *Mansfield* for the defendant, *contra*, contended, that the plaintiffs could not recover on either count. For if the goods were the property of both the partners, as alleged in the first count, each had a right to dispose of the whole; and the consignment by one partner was the consignment of both. That here there was not even a suggestion of fraud; and consequently no ground of action to entitle them to recover upon that count. As to the 2d count, he argued that the bankruptcy of one partner was not to all purposes a dissolution of the partnership. But supposing it were, and that the assignees became entitled to an undivided moiety, they should in that case have declared as the assignees of *Ridgate* only, not as the joint assignees of both the partners. But even in that shape, the action could not have been maintained; for then the assignees and the solvent partner would have been tenants in common, and

trover

trover or detinue does not lie by one tenant in common of chattels personal against another. *Litt. sect. 323*. Therefore the plaintiffs had no title to recover.

Lord *Mansfield*. The single question is, Whether the act of the solvent trader for a valuable consideration, is good, after an act of bankruptcy committed by his partner, without his knowledge, and without the least colour or mixture of fraud. Whether the assignees can, in such a case, come against the *bonâ fide* consignee of the solvent partner, to recover the value of the goods consigned. The assignees stand in the place of the bankrupt, and can in no case be in a better situation than the bankrupt himself would have been in, under the same circumstances. Suppose in this case, the partnership had been dissolved, and the tobacco had been in the possession of *Barnes*, what action could *Ridgate* have had against these goods specifically? Would he have been entitled to any thing but the balance of the account?

Cur. advisare vult.

Afterwards Lord *Mansfield*, having stated the case (*ut antea*) delivered the opinion of the Court as follows;

The question for the opinion of the Court is a general one : whether assignees, under a joint commission against two partners, taken out after the bankruptcy of both, can maintain an action of trover against a person in possession of goods, under a sale or consignment *bonâ fide*, for a valuable consideration, and without any mixture of fraud, from one of the partners, who had not then committed any act of bankruptcy himself, but after an act of bankruptcy committed by the other partner.

An act of bankruptcy by one partner, is to many purposes a dissolution of the partnership, by virtue of the relation in the statutes, which avoid all the acts of a bankrupt from the day of his bankruptcy ; and from the necessity of the thing, all his property being vested in the assignees, who cannot carry on a trade.

In the case of *Hague v. Scott*, *Hil. 8 Geo. 3. B. R.* cited by Mr. *Wallace* and Mr. *Buller*, it was held, that the statutes concerning bankrupts made an intire, not a partial avoidance of the bankrupt's acts, as well in respect of his partner's moiety, as his own. But no case has been cited, where a secret act of bankruptcy

ruptcy by one partner, has been held to avoid an honest conveyance of partnership effects by the other. Each has a power singly to dispose of the whole of the partnership effects.

There are no words in the statute expressly applicable to this case: and there is great reason why they should be avoided. If partners dissolve their partnership, they who deal with either, without notice of such dissolution, have a right against both. After a dissolution by agreement, by an execution, or by a bankruptcy, the partner out of possession of the partnership effects, has the same lien on any new goods bought in, which he had upon the old. But supposing that a secret act of bankruptcy of one partner is a complete dissolution of the partnership, and that from that moment the assignees and the solvent partner are to be considered as tenants in common of the partnership effects; the question will still remain, whether the plaintiffs have any right to recover in this action.

This leads me to consider what right in law and justice one partner has against another, after a dissolution of the partnership.—It clearly is not to change the possession, or to make

make an actual division of specific effects. One partner may be a creditor of the partnership to ten times the value of all the effects. The other partner in that case can only have a right to an account of the partnership, and to the balance due to him, if any, on that account. No person deriving under the partner can be in a better condition. His executor stands exactly in the same light. It is the very text of *Littleton*. In *sect. 321*. he says, “If there be two tenants in common of a personal chattel, and one dies, the executors shall hold and occupy with the survivor, as their testator did before he died.” If a creditor takes out execution against one partner, as in *1 Salk. 392*. the vendee would be tenant in common. And in the case of *Skip v. Harwood*, in Chancery, 6th July 1747, Lord Hardwicke, according to my note, says, “If a creditor of one partner takes out execution against the partnership effects, he can only have the undivided share of his debtor; and must take it in the same manner the debtor himself had it, and subject to the rights of the other partner.”

The assignees under a commission of bankruptcy against one partner, must be in the same state. They can only be tenants in common

common of an undivided moiety, subject to all the rights of the other partner. This is clearly laid down in that case of *Skip v. Harwood*, which is tolerably well reported in 1 *Vezev* 239^o. And I refer you to that report, to avoid taking up so much time as would be necessary to state it from my own notes.

My general memory of the principles explained in that case, and the strong sense upon which this proposition is founded, that one partner can have no right against the other, but to what is due from him after making him all just allowances, induced me without hesitation, to declare my opinion at the trial, that the consignments endorsed by *Barnes* before the 22d of *January* 1773, the day *Barnes* became a bankrupt, could not be avoided by the plaintiffs, either for the whole or a moiety, on account of the bankruptcy of *Ridgate*. But the matter being of value, and no precedent cited, I wished them to take the opinion of the Court.

When it was first argued, the defendant's counsel said little or nothing, expecting to re-

• It is there reported under the title of *H^c v. Skip*

ply; which raised doubt enough to make us order it to be put in the paper. Now, that it is fully understood, we are all clearly of opinion, that the action cannot be maintained.

Supposing the indorsement by *Barnes* of the bills of lading not to bind the undivided moiety of the assignees, which is the utmost the plaintiffs can contend for; then, this is an action of trover, by one tenant in common against another, which cannot be. The text of *Littleton* says so; *Coke's Comment* says so; the *Adjudged Cases* say so; and there is no judgment or *dictum* to the contrary. The text of *Littleton*, *sect.* 323. is as follows: “But if two be possessed of chattels personal in common, and one take the whole to himself, out of the possession of the other, the other has no remedy but to take this from him, who hath done the wrong, to occupy in common, &c. when he can see his time, &c.”

Lord *Coke*, in his Comment on this passage, 200. *a.* says, “If one tenant in common takes all the chattels personal, the other has no remedy by action; but he may take them again.”

So

So in *Brown v. Hedges*, Trin. 7 Ann. B. R. 1 Salk. 290. Upon a case made for the opinion of the Court, the second point resolved was this : “ One joint-tenant, tenant in common, or parcener, cannot bring trover against another, because the possession of one, is the possession of both ; if he does, it is good evidence, upon not guilty : But if one joint-tenant bring trover against a stranger, in that case the defendant may plead it in abatement, but cannot take advantage of it in evidence.” The reason is unanswerable ; there is no conversion.

Upon these authorities, we are of opinion that the action cannot be maintained ; and consequently, that the consignments prior to the 22d of *January* 1773, are not to be brought into the arbitrator’s accounts.

Where one partner takes out more money from the partnership stock than his share amounted to, the other has a *right* to come upon the separate estate of that partner *pro tanto*.

Thus in a matter *ex parte Drake* P, Dec. 20th, 1735, before Lord *Talbot*, where there

p Cited 1 Atk. 225. 2 Ch. Rep. 226. S. P. 16 Vin. Abr. 242. pl. 3.

were two partners, and one had taken out more money from the partnership stock than his share amounted to, and therefore became a debtor for so much; and my Lord *Talbot* was of opinion, that the partnership creditor had a right to come upon the separate estate of the partner who was so indebted.

So in a matter *ex parte Blake*, 20th *December* 1735. It appeared that *Lavington* and *Paul* entered into partnership by indentures dated the 24th of *May* 1725, which continued till *December* 1727, when they executed new indentures of co-partnership, dated the 21st of the same month, and continued therein till the 5th of *September* 1733, when they failed and became bankrupts. The bankrupts, from the time of the first partnership deed, home to their failure, had severally constant recourse to the cash belonging to the joint stock, and *Lavington* had taken thereout, for his own use, at several times during the partnership, 3271 *l.* 18 *s.* 8½ *d.* the interest whereof had been computed to amount to 629 *l.* 8 *s.* 2½ *d.* *Paul* had taken out of the said joint stock, for his own use, at several times within the same time, 2296 *l.* 5 *s.* 7½ *d.* the interest whereof had been computed to amount to 388 *l.* 13 *s.* 6 *d.* and at the same time the
bank-

bankrupts had paid interest for more money, which they borrowed for carrying on their trade, than the sums detained and taken out by them respectively amounted to.

The bankrupts were indebted by means of their joint trade several thousand pounds more than they were able to pay. The sums taken, or near the whole thereof, were afterwards entered into their partnership books, to which each of them had free resort, but there was no consent in writing by either of them to take out either of the sums, for each of them took what he thought proper, without distinguishing whether any part was so taken out as his weekly allowance, according to agreement, and without asking the consent of his partner, but each was, by the said books, made privy to the sums drawn out. The petition prayed that the joint creditors might be admitted creditors on the separate estates respectively, for such sum or sums of money, in respect of their above demands, as should seem proper.

The order recites, that it appearing by the said indentures of co-partnership, that *Lavington* was entitled to two thirds of the said

said joint stock, and *Paul* but to one third thereof, and it also appearing by the said state of facts that the said *Paul* did take out of the cash and stock belonging to the said partnership, considerably more in proportion than was taken thereout by *Lavington*, it was thought that *Paul* ought to be considered as debtor to the estate in partnership between *Lavington* and himself, for so much as he took out of the joint stock more than was taken out in proportion by *Lavington*, regard being had to their respective interests in the said partnership estate, and that the separate estate of *Paul* ought to be considered as indebted to the joint estate of *Lavington* and *Paul* for the same, and the interest thereof. And it was referred to the master to estimate and compute how much the gross sum, in the said state of facts mentioned to be taken out of the stock in partnership by *Paul*, regard being had to his share and interest in the said partnership, exceeded in proportion the gross sum thereby certified to be taken out of the said partnership stock by *Lavington*, regard being had to his share and interest in the said joint stock; and for what the said master should find to be the excess so taken out by *Paul*, and for such proportion of the interest in the said state of facts mentioned and computed

puted to have incurred upon the whole sum thereby stated to be taken out of the said joint stock by *Paul*, as such excess bears to the whole sum so stated to be taken out by *Paul* (which interest was also to be ascertained by the said master) the assignees, under the said joint commission awarded against *Lavington* and *Paul*, were to be admitted creditors under the said separate commission awarded against *Paul*, and to be paid a dividend or dividends in respect thereof out of his separate estate, remaining in the hands of the assignees under such separate commission, in equal proportions with the other separate creditors of the said *Richard Paul*.

But in a subsequent case ^q before Lord *Thurlow*, he very much considered the question, and finally determined that the assignees on behalf of the joint estate could not prove against the separate estate, unless the partner had taken the joint property with a fraudulent intent to augment his separate estate.

Therefore where *Fendall* was a dormant partner with *Lodge*, and *Lodge* took out mo-

^q Ex parte Gull. Exch. Mayne and Graham, 4th August 1790.

ney from the partnership to a considerable amount, without the knowledge of *Fendall*, who did not intermeddle in the partnership business, Lord *Thurlow*, after taking time to consider, thought he could not permit the assignees under a joint commission, to prove against the separate estate of *Lodge*, without deciding upon a principle that must apply to all cases, and constantly occasion the taking an account between the partners and the partnership in every joint bankruptcy. He said, that if the affidavits had gone the length of connecting the bankruptcy with the institution of the partnership trade, and that *Lodge*, with a view of swindling *Fendall* out of his property, had got him into the trade, and then taken the effects of the partnership into his own hands, with a view to his separate creditors, it might have been different. The petition on the part of the joint creditors to prove against the separate estate was dismissed.

Where partners become bankrupts, the allowance is to be divided between them, in the proportions in which the surplus of their respective separate effects, and their respec-

* Ex parte Batson, 20th Jan. 1791.

tive proportions of the joint fund, have contributed to the payment of the joint debts. ^s

And partners can have but one allowance in respect to their joint and separate estate.

Thus in a matter *ex parte Bate*.^t A joint commission of bankrupt issued against the petitioner and *Tilman Henkell*. The joint debts amounted to 22,796 *l.* 13 *s.* 6 *d.* The joint effects to about 5000 *l.* The separate effects of the petitioner amounted to about 30,000 *l.* The debts proved upon his separate estate were 15,894 *l.* but of that sum 15,362 *l.* 7 *s.* 7 *d.* were in fact debts due from the partnership, but as the creditors were joint and several, they thought proper to come in upon the separate estate of the petitioner, as being the most solvent estate. *Henkell's* separate effects, after paying his separate creditors, were about 1,700 *l.* The joint creditors were paid 16 *s.* in the pound, of which (supposing the joint effects to be divided into moieties) the petitioner had contributed in the proportion of 12 *s.* 6 *d.* and *Henkell* of 3 *s.* 6 *d.*

^s Cooke's B. L. 593.

^t *Ex parte Bate*, June 23d, 1785.

Under these circumstances *Bate* petitioned, that the assignees might pay him his allowance of 10 *l. per cent.* not exceeding 300 *l.* in respect of the separate estate, according to the statute of 5 *Geo. 2. c. 30.* and that he might also have such allowance in respect of the joint estate as the Court should think fit.

The first question was, whether it was possible for the same person to have a double allowance, one in respect of the joint and the other of the separate effects; but the Lord Chancellor was clearly of opinion that could not be. But the principal question made was, whether, under the circumstances of this case, *Henkell* was entitled to any allowance, and if so, whether it was to be a part of the 300 *l.* to which the petitioner *Bate* made claim, or whether the statute intended a distinct allowance of 300 *l.* to each partner, when the joint creditors received 15 *s.* in the pound.

His Lordship declared, that the bankrupts were entitled to the sum of 300 *l.* being one allowance only of 10 *l. per cent.* in respect of their joint and separate estates, and that the same ought to be divided and paid to

and between the bankrupts, according to the proportion which the surplus of each of their separate estates, after payment of their respective separate debts, and their respective moieties of their joint estates have contributed to the payment of their joint debts.

And one partner may maintain an action for money had and received against the other partner for money received to the separate use of the former, and wrongfully carried to the partnership account. And where money is owing to two partners, and after the death of one, it is paid to a third person, the surviving partner may maintain an action for money had and received in his own *right* and not as survivor. Thus in the case of *Smith v. Barrow*.^u Where the plaintiff and *Robert Smith* his father had been in partnership together, during which time one *Keate* became indebted to them in 531*l*. *Robert Smith* died, leaving the plaintiff his sole executor. After the death of his father the plaintiff took the defendant into partnership, and *Keate* became indebted to these two in the further sum of 30 *l*.

He afterwards became much involved, and his effects were transferred to certain trustees

^u 2 Term Rep. 476.

for the benefit of his creditors. Two payments were made in the course of distribution at different times. The first, which was made to these parties (the plaintiff and defendant) was divided between them according to their several proportions; that is, the proportion of the former debt of 531 *l.* to the plaintiff's separate use, and the proportion of the 30 *l.* in moieties between them. After this the trustees transmitted a bill of exchange to the plaintiff and defendant, in their joint names, and the defendant alone received the money, under the title of *Smith and Barrow*. The plaintiff's proportion of this second dividend, so far as related to his original debt, was 79 *l.* 14 *s.* 6 *d.* for which this action for money had and received was brought. A rule was obtained to shew cause why the verdict, which had been given for the plaintiff, should not be set aside, and a nonsuit entered, on two grounds; first, that the action ought to have been brought by the plaintiff as executor or surviving partner. 2dly, That the remittances being made to *Smith and Barrow*, it appears to have been received on a partnership transaction, and one partner cannot maintain his action against another, because a receipt by one is a receipt by both.

Bower and *Morgan*, who shewed cause against the rule, answered the first objection by observing that the right of action did not accrue against the defendant till after the death of the testator and partner, because the money was not received by him till afterwards. And as to the second ground, that the proportions of money due to either were very well settled, and indeed had been admitted by the defendant himself upon the former settlement; and the facts clearly shewed that as to the plaintiff's proportion in respect of the former debt due from *Keate*, it could not have been received by the defendants on account of the partnership subsisting between him and the plaintiff, and therefore *quoad* such sum they were like any other two indifferent persons, and not as partners; and if so the action might well be maintained.

Bearcroft and *Russell*, in support of the rule, said that the first objection was taken for the purpose of enabling the defendant to set off any debt which he might have been entitled to, had the action been brought in another form. But supposing that not to be a sufficient ground of objection, they contended that the next was well founded: it

lay on the plaintiff to make out the proposition that the money had been received to his use by the defendant. Now the evidence expressly contradicts any such idea. The remittance was made to the partnership; it was an *entire payment* and an entire transaction. The money was received by the defendant as a *partner*; he was jointly entitled to receive it with the plaintiff in that character, when received, it made an *item* in the partnership account if any mistake had been made in the bill which was transmitted and the party transmitting it had paid too much, he must have brought the action against the *partnership* for the surplus, and their joint stock would have been answerable to him. If so, then it falls under the common rule, that one partner cannot maintain an action for money had and received against another, and that rule which is founded in reason ought to be extended to this case; for supposing that on the whole of their dealings in partnership the plaintiff should be indebted to the defendant this latter will be precluded from setting off his debt.

Ashburst J.—As to the first objection, that this action should have been brought either as executor, or as surviving partner, the same
answer

answer may be given to both. Where the money is received after the death of the testator, the executor may declare either in his own right, or as executor, because the testator never had a specific cause of action to recover that sum against the party receiving it, and therefore he may declare in his own name; neither would he shelter himself from the costs as executor, if he were to fail, where he might have brought the action in his own name, the same answer may be given to the objection that this action should have been brought as surviving partner; because this specific sum was never received by him as partner. The partnership was before put an end to by the death of the other partner; neither is there any foundation for the second objection; the two sums belonging respectively to the plaintiff, and to the partnership account, were consolidated merely for the convenience of the party making the remittance, but the sum now claimed by the plaintiff did not belong to the partnership account; and as the defendant has received a sum of money belonging to the plaintiff alone, which he has wrongfully carried to the partnership account, he is liable to refund it in this action.

Buller J.—I am of opinion not only that the action is properly brought but that it could not have been brought in any other form: In what character was the money received by the defendant? The former dividend was received and divided according to the proportions of the respective debts of the plaintiff, and of the plaintiff and defendant as partners, then on the receipt of the second dividend by the defendant, it should have been divided into two parts bearing the same proportion to each other as the separate demand of the plaintiff on *Keate's* estate, and the joint demand of the plaintiff and defendant. The plaintiff would have been solely entitled to the first part, and must have shared the other part with the defendant as due to the partnership account, so that the first part of this sum was money specifically received by the defendant to the plaintiff's use. And if the action had been brought by the plaintiff as surviving partner, it would have been necessary for him to have shewn that he and the deceased partner had a cause of action against this defendant, but they never had any such cause of action; and it is immaterial to look back to see how third persons were concerned if as between the plaintiff

plaintiff and the defendant, the latter has received a sum of money for the use of the former. Then it has been said that there could be no set-off in this case; but I am of a different opinion, for this is an action for money had and received, in which the plaintiff can only recover what is in justice due to him, therefore supposing any debt were due from the plaintiff to the defendant, it was for the advantage of the latter to bring the action in this form. With regard to the sum of 30*l.* due to this partnership, I agree that this action cannot be maintained. *One partner cannot recover a sum of money received by the other unless on a balance struck that sum be found due to him alone.* But this objection does not apply to the larger sum in this case which is the one in dispute.

Grose J.—In answer to the first objection I am of opinion not only that this action may be maintained but for the reasons mentioned by my brother *Buller*, that it could not have been brought in any other way; because there never was a joint cause of action in the plaintiff and his late partner. The case of *Hyat v. Hare* * is nearly similar to this, where *Holt Ch. J.* said, “If there be two partners

* Comb. 383.

“ in trade and one of them buy goods
 “ for them both, and the other dieth, the sur-
 “ vivor may be charged by *indebitatus assump-*
 “ *sit* generally without taking notice of the
 “ partnership or that the other is dead, and he
 “ survived.” In that case the defendant was
 the surviving partner, but that makes no
 difference, for the reasoning applies equally
 to this case. With respect to the other ob-
 jection; it appears that the defendant has
 received a sum of money partly on the plain-
 tiff’s account, and partly on the partnership
 account, the former of which he wrongfully
 carried to the partnership account, but that
 being his own act, and it being against the
 truth and justice of the case, I am of opinion
 that he ought not to be permitted to set up
 the partnership as a defence to this action.
 Supposing that the plaintiff had received this
 money he would have been entitled to have
 set apart for his separate use the whole sum,
 except that part which belonged to the part-
 nership account: then the circumstance of
 the defendant’s having received it cannot
 alter the right.

Rule discharged.

And with such scrupulous exactness do
 we find the *rights* of partners maintained
 upon

upon all occasions in this country, that even a merchant-partner who has a seat in parliament shall not be suffered to shelter himself under the privilege of Parliament. For, by an order of the House of Commons, with respect to partnerships, made on the 16th of *November 1722*, it was resolved, that no co-partner in any trade or undertaking, is entitled to the privilege of Parliament.

Sir *George Caswell* standing up in his place, and acquainting the House that he was willing to wave his privilege in the cause, wherein he was one of the defendants, depending in the court of Chancery, between him and *Alexander Urquhart*, Esq; member of that House, whose petition was referred to the Committee of Privileges, to enquire whether Mr. *Urquhart* would wave his privilege; and Mr. *Urquhart* declaring that he would not insist on his privilege, it was ordered, “ That the Committee of Privileges be discharged from proceeding on the petition of *Alexander Urquhart*, Esq; complaining of Sir *George Caswell*’s insisting upon the privilege of this House, as he is co-partner with *Jacob Sawbridge* and *Elias Turner*.”

Whereupon it was resolved and declared, *nemine contradicente*, “ That no co-partner in
any

any trade or undertaking, is entitled to the privilege of this House, in respect of any matter relating to such partnership” y.

Thus having endeavoured to trace the *rights* of partners as between themselves, I shall next proceed to enquire how far they are implicated in each other’s wrongs?

y *Veneris*, 16 November 1722.

CHAPTER IX.

How far Partners are to be considered as participes criminis, or are otherwise implicated in Wrongs done by each other.

AS probity and fair dealing are among the chief requisites in all partnership transactions, and as the partnership contract itself is founded on the very basis of reciprocal advantage, and mutual benefit, the moral obligation between the parties must hang in an even balance; consequently the only mode to preserve that balance is, for each individual to abstain from doing wrong in any matter relating to their joint concerns, because if either of them should engage in transactions of trade not consistent with this rule; as for example, if he should be guilty of trading on the joint account in contraband goods, or in any manner prohibited by law, the rest of the partners must be considered more or less implicated in such joint transaction.

And

And since partnership is a contract invented by the Law of Nations^a, for the advancement, and oftentimes for the protection of fair and open trade; the judges of our courts in this country would not suffer an action to be maintained by several partners for goods sold by one of them living in *Guernsey*, and packed by him in a particular manner for the purpose of smuggling, though the other partners who resided in *England*, knew nothing of the sale; for it is a contract by subjects of this country, made in contravention of the laws: and such a case must be considered in the same light with respect to the whole firm as if all the partners had lived in *England*: And the place where the contract of sale was made, did not alter the nature of the contract, so as to prevent the law from attaching upon it as contraband, and therefore not proper to be enforced or affirmed.

Thus in the case of *Biggs and others v. Lawrence*^b, where upon a rule to shew cause why there should not be a new trial, in a cause tried before *Buller J.* in *Cornwall*; the learned Judge reported that this was an action

^a *Societas contractus juris gentium consensu constans.* Inst. 3. 26. pr.

^b 1 Term Rep. 454.

for goods sold and delivered, brought by four partners, plaintiffs, three of whom lived in *England*, and the other in *Guernsey*. The defendant, who lived in *Cornwall*, sent an order for some brandy to the partner living in *Guernsey*, which he directed to be delivered to one *Wood*, the captain of a smuggling vessel. Some of it was delivered at *Guernsey*, other part of it at sea. It was all put, by the partner at *Guernsey*, into half ankers, and ready slung for the purpose of smuggling: but it was to be brought into *England* at the risk of the defendant. The contract was made, and the goods delivered, without the privity or personal participation of the three partners residing in *England*. Two objections were made at the trial by the defendant's counsel; 1st. That *Wood*'s handwriting, acknowledging the receipt of the goods, was not sufficient to charge the defendant, but that *Wood* himself ought to have been called: but as it was established that *Wood* was the defendant's agent for this purpose, the goods being directed to be delivered to him, Mr. Justice *Buller* thought that any acknowledgement under his hand was evidence against his principal, as much as if it had been an acknowledgement in the handwriting of the defendant himself. 2dly. It

was objected that the plaintiffs could not recover, because it appeared by their own shewing, that the goods were intended to be smuggled into *England*, of the laws of which, they, as subjects of the Crown of *Great Britain*, were bound to take notice, and that one of them had actually assisted in the very act of smuggling: and the learned Judge being of that opinion, nonsuited the plaintiffs.

Lawrence Serjeant, against the rule, was stopped by the Court.

Gibbs, contra, admitted that the question must be considered as if all the plaintiffs lived in *England*, but contended that they were entitled to recover the value of the goods, because the contract of sale, and the delivery of the goods, were completed at *Guernsey*, where such a contract was not illegal: and the goods being afterwards smuggled into *England* will not defeat the plaintiff's right, which accrued on the delivery of them, as they were not concerned in the subsequent act of smuggling; even though they knew at the time that the defendant intended it. The case of *Holman v. Johnson*^c, expressly decides this point, which was fully discussed both at

^c Cowp. 341.

the bar and on the bench: and that case has been acted upon as law ever since. Now that cannot be distinguished from the present case upon any of the principles on which it was decided. In both, the contract was completed abroad, and the vendor knew that the goods were to be smuggled into *England*^d. But even supposing that a contract for the sale of goods was made in *England*, and the delivery of the goods here; there is no authority to shew that the vendor cannot recover the price, on account of any illegal use which the vendee may *afterwards* make of them: and yet innumerable instances must have occurred, wherein such a defence might have been set up in point of fact. If the sum which the vendor was to receive depended on the subsequent illegal act, or if the vendee, by his contract, were obliged to make an illegal use of the goods, that might make a difference. But here the contract was completed before any illegal use was made of the goods. On the contrary there are analogous

^d It should seem from the manner in which the case of *Holman v. Johnson* is reported, that one of the plaintiffs was a subject of this country, though resident at *Dunkirk*; for one of them is stated to be *resident* at, the other a *native* of *Dunkirk*: but no stress is laid on that circumstance.

cases in which it has been held, that the original contract is not affected by the subsequent use made of the thing contracted for, if it be optional in the party to apply it afterwards to what purpose he pleases. As if one lend money to another to game with, although gaming be illegal, yet it hath been held that such money may be recovered by the lender, although it be lent at the time and place of play *e*. For the statute 9 Ann. c. 14. s. 1. only annuls the *security*, and not the *contract*.

So in the case of *Petrie v. Hammett*^f, it was objected that, as the plaintiff knew of the illegality of the transaction, they ought not to recover; but the Court thought that did not affect the contract, with respect to the rights of the party who advanced the money by the direction of the defendant. In no instances have objections of this sort prevailed, unless where the plaintiffs were themselves parties to the illegal act, which cannot be said to be the case here; for before the goods were attempted to be smuggled into *England*, the contract of sale was entirely completed.

^e Robinson v. Bland, 2 Burr. 1077.

^f 3 Term Rep. 418.

Lord Kenyon Ch. J.—If the decision of this case had the least tendency to overturn that of *Holman v. Johnson*, I should certainly pause a little, before I gave any opinion, which might shake it. But I wish to leave the authority of that case unquestioned, because I approve of it. To the case of *Robinson v. Bland* I also give my assent. The former of those cases was a contract entered into by foreigners bound by no allegiance to this country: and the latter was a contract made in *France*, which, being warranted both by the laws of that country and this, was carried into execution here. But in this case it is admitted, and the plaintiff's counsel was obliged to make the admission, that this must be considered as a contract made in *England*. But it has been insisted that no adjudged case is to be found, in which it has been determined that persons, standing in the situation of these plaintiffs, shall not recover. But similar cases have frequently occurred at *Nisi Prius*; and the reason why no solemn decisions are to be met with on the subject is, because the *Nisi Prius* determinations were thought too clear to be questioned. Where a contract is made for smuggled goods, a party cannot come into a Court of Justice to recover on it. A person suing in a Court of

Law, must disclose a fair transaction: and it must not appear, from his own shewing at least, that he has infringed the laws of his country. Now here, three of the plaintiffs lived in *England*; and it is clear that they knew either personally, or (which is the same) by their agent, the other partner living at *Guernsey*, that the contract, which they had entered into, was made in direct contravention of the laws of their country; for the goods came under more than suspicious circumstances, since they were sent in flings and half ankers, ready for smuggling: and it requires much argument to convince me that a contract thus made can be carried into execution in *England*. There is no *dictum* in favor of the plaintiff's right of action; and the whole string of cases by analogy is against it. Therefore I am of opinion that the non-suit ought to stand.

Asphurst J.—I form my opinion on this circumstance, that three of the plaintiffs lived in *England*; and therefore though the partner, with whom the contract was made, lived abroad, this case must be considered in the same light as if all the partners lived here. It is not necessary to determine whether a person who sells goods in *England*, which are afterwards

terwards to be applied to an illegal purpose, can recover the price of them here. For in this case the goods were sold and delivered, not in *England*, but in *Guernsey*, and packed too in such a manner as to shew that they were intended for the purpose of smuggling. The plaintiffs were agents to the very act of smuggling; were *participes criminis*, and therefore cannot avail themselves of the laws of this country in order to enforce a contract made in direct opposition to them.

Buller J.—This case must be considered as if it were a contract made between the plaintiffs and the defendant, all residing in this country, for the delivery of goods in *Guernsey*, for the purpose of smuggling them into *England*. And I use the latter expression, because it is clear, from the manner in which they were packed at the time when they were delivered, that they were intended to be smuggled: that was the act of the plaintiffs. And I cannot say in a court of justice that the plaintiffs, so offending against the law of the land, shall be permitted to recover on such a contract. None of the cases cited apply to the present. That of *Holman v. Johnson* went on the ground of the plaintiffs being foreigners, which materially distinguishes it from this; because the subjects of one country

try residing there are not bound to take notice of the revenue laws of any other. That maxim hath been long since adopted here, and recognized by Lord *Mansfield* in *Holman v. Johnson*. But this is the case of one the king's subjects making a contract directly against the statute laws of this country. Neither has the case of *Petrie v. Hannay* any relation to the present: here the contract on which the action is founded is illegal; which was not so there. And in order to make this case like that, it is necessary to shew, that these plaintiffs were not concerned in the original transaction, but afterwards paid money for the use of the defendant, which they wished to recover back; for there the money was paid to a person, who was not a partner in the original transaction; and the action was founded on the subsequent contract, and not on the stock-jobbing transaction.

Grose J. of the same opinion.

Mr. *J. Buller* then said, that another objection had been made at the trial, that the plaintiffs ought not to be non-suited, and that it should have been left to the jury to consider whether the plaintiffs knew the goods were to be smuggled; but that he had been
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of opinion that, as the counsel on both sides had fully argued the question of law on the admission of facts, the plaintiffs ought not to be at liberty to go to the jury on the same facts, when they found his opinion against them in point of law; to which the Court assented.

Rule discharged.

But if two persons *jointly* engage in a stock-jobbing transaction, and incur losses, and employ a broker to pay the differences, and one of them repay the broker with the privity and consent of the other the whole sum, he may recover a moiety from that other in an action for money paid to his use, notwithstanding the 7 Geo. 2. c. 8. Thus in the case of *Petrie v. Hannay* 8, which was cited in the foregoing, and is reported as follows; *viz.*

In the year 1773 the testator, *Sadlier, Petrie*, and the defendant, were engaged together in stock speculations on their joint account to a considerable amount, the whole of which were illegal, except a transfer of a sum of 10,000 *l.* Having incurred several losses, on the 8th of *January* 1774 they came to a settlement with *Pertis* their broker, who had paid all the differences. And on that occasion

sion *Keeble* repaid to *Portis* the whole sum which had been so advanced by him, except 811 *l.* which was part of the defendant's share of the losses, and for which *Keeble* drew a bill on him in favour of *Portis*, which the defendant accepted. This bill not being paid by the defendant when it became due, *Portis* brought an action thereon, after *Keeble's* death, against the present plaintiffs his executors, and recovered the amount, no defence being set up on account of the illegality of the transaction. £.264 part of the sum for which the defendant had given his acceptance, was his share of the loss arising from the real transfer of the 10,000 *l.* The present action was brought to reimburse the plaintiffs the sum recovered against them by *Portis*, and the declaration was for money paid by the plaintiffs to the defendant's use; upon which they obtained a verdict for the whole demand, at the Sittings after last *Easter Term*, at *Guildhall*, before Lord *Kenyon*. A rule was obtained last term to shew cause why the verdict should not be set aside in *toto*, or at least be reduced to the sum of 264 *l.*

Bearcroft, *Mingay*, and *Russell*, now shewed cause; contending that this case did not fall within the statute 7 *Geo. II. c. 8.* for preventing

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ing stock-jobbing, as this was not an action to recover any money “ for the compound-
“ ing, satisfying, or making up, any dif-
“ ference for the not delivering, transferring,
“ having, or receiving any stock, &c. or
“ for the not performing any contract or
“ agreement so stipulated to be performed,
“ &c.” but it was to recover money which had been paid to *Portis* under the authority of the defendant, and for which he was answerable, whatever might have been the question as between *Portis* and him.

And they relied upon the case of *Faikney v. Reynous*, and another ^b, where to an action of debt on a bond the defendant pleaded the act of the 7 Geo. II. c. 8. that the plaintiff and *Richardson* were jointly concerned in certain contracts contrary to that statute; that the plaintiff voluntarily paid the differences; and that the bond was given by the defendants for securing to the plaintiff *Richardson's* proportion of that loss; and on demurrer the Court were clearly of opinion that the plaintiff was entitled to recover the amount which he had paid under the special authority of *Richardson*, though for an illegal purpose. The principle of that case fully extends to

^b 4 Burr. 2069.

the present; and indeed the plaintiffs are one remove farther from the illegal transaction, for not only the plaintiffs were authorised by the defendant to pay this money to *Portis*, but *Portis* himself had been authorised before by the defendant to pay it to those persons between whom and the defendant the illegal contract was entered into. At all events, the plaintiffs are entitled to the 264*l.* even if they are precluded from recovering the rest; as that part of the demand stands perfectly clear from any objection arising under the act.

Erskine and *Wood*, in support of the rule, insisted that the whole transaction was illegal, and came within the spirit of the 7 *Geo. 2.* and that even the 264*l.* making a part of the illegal transaction, was so involved therein, that it could not be distinguished from the rest, so as to form a separate consideration, but was part of the colour used in carrying on the general scheme of speculation. It is to be observed that *Petrie*, *Keeble*, and *Hannay*, were partners in this illegal transaction; they were all *participes criminis*; and it has been frequently determined, that one partner cannot call upon another for his contribution to a loss arising out of a matter prohibited by law;

law ; for though the act of Parliament does not say in direct terms that the security shall be void ; yet when the consideration of the security is inquired into, if it appear to have been given in opposition to the spirit of the act, the court is bound to declare it void. Otherwise if a party could recover in this circuitous manner, by paying the whole of the sum in the first instance, the statute would be altogether defeated. Suppose *A.* and *B.* in partnership contract for smuggled goods, and *A.* pays the whole, and *B.* gives him his note for his proportion, it was never pretended that *A.* could recover on such note from *B.* So here, if *Keeble* had brought the action on the bill of exchange against the defendant, it would have been a good plea for the latter, that he and the plaintiff had been partners in a stock-jobbing transaction, in which a loss had happened, and that the bill was given for the defendant's proportion of that loss ; and whatever would have been a good plea in such an action, is an ample defence now. As to the case of *Faikney v. Reynous*, it is very distinguishable from the present : that came on upon demurrer ; and as the court could not look at any thing out of the record, and sufficient was not stated in the plea to shew the illegality of the transaction, this question did
not

not fairly arise. The plea in that case did not state that there had been a previous co-partnership between the plaintiff and the defendants, to share in the profit and loss of the illegal transaction; the defendant *Reynous* was a mere stranger: but this is a security given by the defendant to the very person with whom he had contracted in violation of the laws of his country. From the whole of that case it appears that the decision turned on the insufficiency of the plea, rather than on the legality of the transaction; and sufficient appears to shew that the Court would have extended the statute to a case like the present, if it had been so stated on the record. It is further to be observed, that at the time when this bill was accepted by the defendants, no money had been paid by *Keeble* for this express sum to *Portis*; and it was no more than a mean of the defendant's paying *Portis*, in whose favour it was drawn, that sum, on account of the very differences prohibited to be recovered by the act. If so, no subsequent transaction to which the defendant was not a party, can vary the case as to him. With regard to the sum of 264 *l.* that is so involved in the illegal transaction, that it cannot be separated from it: it was a mere temporary expedient,

expedient, auxiliary to the general stock-jobbing scheme.

Lord *Kenyon* Ch. J.—As to the last point made in the argument, relative to the 264*l*. I have no doubt whatever. It appeared to be a fair transaction; the stock was actually purchased, and the transfer of it was made: none of the provisions of the act were thereby infringed; and it is too much to say that, because it was accompanied by other transactions at the same time, which were invalid, this shall not be binding. But, on the principal, I have not formed so decisive an opinion but that I may be open to conviction hereafter: at present I can only say that I have not heard any argument to convince me that the plaintiff's demand can be enforced. The great difficulty is to distinguish this case from that of *Faikney v. Reynous*; but that does not at present appear to me to conclude this question. That was an action on a bond; and the whole argument at the bar, and the decision of the Court, proceeded on the ground that they could not take into consideration matter which was not properly introduced by the plea. And they thought, that as nothing illegal, as between those parties, was disclosed on the record, the payment

ment of the money could not be resisted. But this is not the case of a bond. And if we consider this case *a priori* on the ground of policy, and recollect the infinite mischiefs brought on individuals by means of stock-jobbing, which this act was intended to prevent, it is very much to be wished that the remedies offered by the Legislature should extend to the whole mischief. Now I do not see how that can be done so effectually as by saying that no person, who is concerned in such a transaction, shall recover any demand arising out of it in a Court of Law. The first action, which was brought against these plaintiffs, was on a bill of exchange, which had been accepted by the defendant on account of the losses: Now it is clear that that action did not merge the original demand, and the whole transaction may still be brought before the Court. And if it appear to the Court that a bill of exchange is given without any consideration, it is *nudum pactum ex quo non oritur actio*; or if for an illegal consideration, the whole matter may be examined. But in the case of a bond, the consideration cannot always be gone into; as in the instance of a voluntary bond. In this case the testator and the defendant were partners in an illegal transaction, in which *Portis*
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the broker acted as agent, knowing it to be contrary to law, since every man is bound to take notice of public laws. Now it is a rule that those, who come into a Court of Justice to seek redress, must come with clean hands, and must disclose a transaction warranted by law. And I cannot distinguish this case from that of smuggling, put at the bar, where if one of two parties advance money in a smuggling transaction, he cannot recover his proportion of it against his partner, because the transaction is prohibited; and yet smuggling is not *malum in se*, as contradistinguished from *malum prohibitum*. If this transaction had been disclosed in the former action, *Portis* could not have recovered: now supposing the bill of exchange puts the plaintiffs in his situation, they are not assisted by it; or considering them on the other hand standing in their own situation, unconnected with *Portis*, they then appear as partners in a matter prohibited by the laws of the country, and cannot therefore have recourse to those laws to enforce their contract. But at present I speak with great diffidence; and I shall be glad to correct this opinion, if on re-consideration I find I am mistaken. I wish however to have it understood that I do not mean to disturb the case of *Faikney v. Reynous*; there

the Court did not think themselves warranted in saying that sufficient was disclosed on the record to bring the case within the statute: but here the whole transaction may be enquired into, which, on examination, is I think prohibited by that act.

Asheburst J.—Whatever my opinion might have been, if this had been *res integra*, I think that this case must be governed by that of *Faikney v. Reynolds*. And if we were to determine that the plaintiffs are not entitled to recover in this action, we must overturn the authority of that case. The Court did not proceed in that case on the ground that it was an action on the bond, and that the defendants were not at liberty to go into the consideration of it; for they permitted a discussion of the facts stated in the plea, and they argued from them: but they said, that even admitting them to be true, still it was no defence to the action; and Lord *Mansfield* and the whole Court proceeded on the ground, that as it was not *malum in se*, but only *malum prohibitum*; and as the plaintiff was not concerned in the use which the other made of the money, it was a fair and honest transaction as between those parties. Now as the Court in that case entered

tered into the merits disclosed by the plea, I see no difference between that case and the present. And here one of the parties (the testator), engaged in the transaction, paid money to the use of the defendant, which was done by paying a bill, which had been drawn by the former, and accepted, though not paid, by the latter: Now that acceptance was an admission on his part that the other acted with his consent and privity. It is the same as if the testator had originally paid this money to the defendant's use, with his privity and at his request. And if he had made such a payment, it being only *malum prohibitum*, and not *malum in se*, and the defendant being bound in honor and conscience to repay him, I think the plaintiffs would have been entitled to recover.

Buller J.—With respect to the sum of 264*l.* that point is too clear to admit of any doubt. But in order to consider the great question in the case, whether the plaintiffs are entitled to recover the large sum under the circumstances which are disclosed, it is necessary to trace this transaction to its origin. For it very much depends on the light in which this question must have been considered, if *Portis* had been the plaintiff. Al-

though much evidence was given at the trial of the different transactions between these parties as far back as the year 1773, I think sufficient is stated to warrant the Court in drawing this inference, that the defendant consented and requested *Portis* to pay the differences in the stocks. And here I agree, that, in the case of an illegal transaction, if one person pay money for another without an express authority, he cannot recover it back. For there is a wide difference between the cases of partners engaged in legal and illegal contracts; in the former, if one of the partners pay the whole of a partnership debt without any express promise from the other, the law gives him a right to recover it back in an action for money paid to the use of that other partner, and it proceeds on this ground, that both are liable to pay. But in the case of illegal contracts, as they are not bound to pay, one of them cannot acquire a right of action against the other by paying the whole without his consent; in such cases it is necessary to have the consent and direction of that other. The question therefore here is, whether the Court cannot infer from the evidence that the money was paid with the knowledge, consent, and authority of the defendant; and I am of opinion that the Court

are bound to draw that conclusion. It appears that the defendant was apprised of these transactions from time to time; and when the accounts were settled he made no objection, but agreed to pay his proportion of the loss, and accepted a bill drawn on him by *Keeble* in favour of *Portis*. How then would the case have stood, if *Portis* had been the plaintiff? And here I agree with my brother *Ashurst*, that, as *Portis* paid the money with the consent of the defendant, he would be entitled to recover it back again, unless the determination of *Faikney v. Reynous* be not law. Some light may perhaps be thrown on that case, from considering the time when it was argued: it came before the court in *E. 7 G. 3.* just at the time when the question in pleading, whether a defendant could aver any thing *dehors* the condition of the bond, had undergone much discussion in *Westminster-Hall*. The case of *Downing v. Chapman* had been then argued in the Court of Common Pleas; but I do not know whether it had been decided: I rather think it was then under consideration; for if it had been determined, probably some notice would have been taken of it in the case of *Faikney v. Reynous*. But in later times it has been considered, and is

ⁱ Vide 2 Wils. 347.

now fully settled, that matter *debors* the bond may be pleaded. And it would be highly inconvenient if it were otherwise: for no person who is engaging in an illegal transaction would be so absurd as to state the illegality of it on the bond itself. It is observable that, in arguing *Faikney v. Reynous, Wallace* relied on the point that the party could not aver any thing *debors* the bond; to support which he cited a passage from *Noy* 72. but that book has always been considered as a bad authority. But Lord *Mansfield* was silent on the question of pleading; perhaps because the other case was then depending in the Common Pleas; and he gave his opinion on the general ground, that if one person apply to another to pay his debt (whether contracted on the score of usury, or for any other purpose, it makes no difference), he is entitled to recover it back again. And he did not seem to consider that there was any distinction, whether the debt arose on a bond or other security. The three other Judges also concurred; and said, “that it remained “a good bond on the face of it, *till* the “obligor shewed that it was bad.” So that the conclusion drawn by them is, that the transaction as disclosed by the plea, did not make it illegal as between those parties. There-

Therefore I think that this case is governed by that of *Faikney v. Reynolds*.

Grose J.—I agree clearly, as to the smaller sum, that the plaintiffs are entitled to recover. As to the other point, I have had some difficulty in forming my opinion. On the part of the defendant, there is neither honour or honesty in the defence; and the plaintiffs ought to recover as much as the law can give them, without interfering with one of the most politic and beneficial statutes that was ever passed. But if we see clearly that the plaintiffs are so involved in the illegal transaction, that it was intended that the statute should extend to them, they cannot recover. However it is to be considered that this action is not founded on a promise arising by implication of law out of the illegal transaction, but from an express one made subsequently, and which the defendant was under no necessity of making: And I agree in the distinction which my brother *Buller* has made between promises founded on illegal and legal contracts. And although I have entertained doubts on this question, I cannot distinguish this case from that of *Faikney v. Reynolds*; upon which I give my judgment.

Rule discharged.

This ^k was an action of debt upon a bond. The defendants prayedoyer of the condition; and then pleaded the act of Parliament of 7 Geo. II. c. 8. (“An act to prevent the infamous practice of stock-jobbing;”) and that the plaintiff and *Richardson* were jointly concerned in certain contracts, &c. That the plaintiff, contrary to the statute, voluntarily gave to divers persons large sums of money, &c. amounting to the sum of 3000 l. for compounding and making up differences for the not delivering stock, &c. and for not performing contracts, &c. (following the words of the act of Parliament :) and that this bond was given by the defendants to the plaintiff for securing the *re-payment* of 1500 l. (being the moiety of the said sum of 3000 l.) to the plaintiff, by the said *Richardson*. To this plea the plaintiff demurred; and the defendant joined in demurrer.

Mr. *Wallace*, for the plaintiff, argued that this plea was a bad one, and *no defence* against this bond. The defendant insists, that the bond is *void*, as being entered into for securing the re-payment of money paid *illegally*, and *contrary* to this act of Parliament. The question arises upon s. 5. of that act,

& *Faikney v. Reynous*, 4 Burr. 2069.

which

which is calculated for preventing the compounding or making up *differences* for stocks or other public securities; without specially executing the contract, and actually delivering the stock, &c. The offence constituted by this act, is the compounding differences, instead of actual performance of the contract: and a penalty or forfeiture of 100*l.* is inflicted upon the offender. But this *bond* is not within the clause. It is, at most, a voluntary bond, given for reimbursing the plaintiff the moiety of a sum of money which the plaintiff had paid on account of *Richardson* and himself. It is for the payment of money only. No illegal consideration appears upon the *face* of it: and nothing *dehors* can be received. The matter objected by the defendant cannot be received by the court, as *invalidating the bond*; because it neither appears upon the record, nor is in itself criminal at common law: and the statute not having declared such a bond void, the court will not attend to this averment, because this was not an offence till this act of Parliament made it one. *Noy 72. Gregory v. Olden.* In debt upon an obligation, it was said, "that it was made upon a simoniacal contract; and so it was for simony." All that was averred to be matter *dehors*, and not appeared within

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in the deed. And *for that*, the plaintiff had judgment: for, no such averment is given by the statute. Mr. *Cox*, *contra*, on behalf of the defendant, argued, that the money was paid by *Faikney* the plaintiff, contrary to law: and this bond given to secure the re-payment of half of it to him, was in its nature void.

If *Faikney*, instead of *paying* the 3000 *l.* had only *given a bond* for that sum to those he had contracted with, such bond would have been void. And this bond for securing to *Faikney* the re-payment of *Richardson's* half of that sum, was (as Mr. *Cox* argued) tantamount to it, and equally void. And he compared this bond given to *Faikney*, for a re-payment of money illegally paid by him, to the case of a bond given by a third person for re-payment of money given to compound a felony. He observed, that by the first section of this act, *Faikney* might recover back the whole 3000 *l.* from the persons to whom he had paid it: in which event, he would even be a gainer of 1500 *l.* if he could also recover so much upon the present bond, and thereby be twice paid. If two partners in smuggling should be to pay money upon an illegal consideration; and one of them should pay the whole, and take a bond from the other for half, such

such bond he said, would be void. So, if the money secured by the bond was advanced and paid in any criminal transaction. And he mentioned a case in the Exchequer, a few years ago, where the court would not relieve, in a contract between two highwaymen: for the whole transaction was founded on a criminal offence. So here, *Faikney* and *Richardson* were partners in all these contracts: and both partners were culpable. *Faikney* was the principal: *Richardson*, only a partner. The plaintiff (*Faikney*) was not an innocent person, but principally criminal, and the actual offender. This is a mere evasion of the act, and would render it quite nugatory. It is totally at an end, if this bond is not void: for, the money would, or at least might, always be paid in this method, if this method should now be allowed. As it was a matter of great consequence, he therefore hoped for another argument; and said he had not had sufficient time to prepare an argument in support of the demurrer.

Mr. *Wallace*, in reply.—The imaginary bonds which Mr. *Cox* has supposed, would not be void. However, *this* bond can, at the utmost, be no more than a bond without a legal consideration to support it. But if it were

were so, it would be no more than a voluntary bond; and would be good between the parties. This money can never be recovered *twice*. For, the first section of this act gives no such recovery to the plaintiff, as Mr. Cox has furnished; it is confined to the particular cases therein specified, *viz.* putts, refusals, and wagers.

Lord *Mansfield* was clear that the matter contained in this plea is no *defence* against the action brought upon this bond. The offence relied upon as furnishing a ground of defence against being liable to pay it, is *not malum in se*: it is only *prohibited by this act of Parliament*. He mentioned a case of one *Hales*, a broker, (before himself at *Nisi Prius* at *Guildhall*), where a rescouter contract, prohibited under a penalty by the stock-jobbing act 7 G. 2. c. 8. was held to be void; and that the plaintiff could not recover thereupon. But here, *one* of these two persons had paid money for the other, and upon his account; and he gives him his bond to secure the *re-payment* of it. *This* is not prohibited. He is not concerned in the use which the other makes of the money: he may apply it as he thinks proper. But, certainly, this is a fair, honest transaction *between these two*. If money be
lent

lent in order to pay a *play-debt*, (supposing the lender not to have been present at the time and place of the play); or in order to pay off an *usurious* contract, or even to *lend* out money upon usury; and a bond be given for securing the re-payment of the money so lent; such a bond will not be void: the obligor will be bound to pay it. Its being *voluntary* is *not*, of itself, an objection to his being liable to the payment of it: it is a good bond, unless something appears to render it otherwise.

The three other Judges concurred, that this bond was *not* within the act of Parliament, nor did it appear to have been given upon any illegal consideration; and that the plea was no defence against the payment of it: and therefore that it remains a *good bond* upon the *face* of it, till the obligor can *shew* that it is bad. They observed, that paying money to compound these differences was not a *malum in se*; but only stood prohibited by this act; which neither says or means to invalidate all securities relating to it, (as the act against excessive gaming does): it only prohibits *paying* or *receiving* money for compounding differences. This is not a bond for payment of the *composition-money* to the persons *Faikney* and

and *Richardson* had contracted with; but a bond for *Richardson's* paying to *Faikney* a debt of honour, and reimbursing to *Faikney* the money that *Faikney* had paid upon *Richardson's* account, to compound the difference of contracts wherein they had been jointly concerned: and therefore it is a good bond, and the plaintiff ought to recover upon it.

Per Cur. unanimously — Judgment for the plaintiff.

So that, where the original transaction however is not morally bad, its illegality arising only from its being prohibited by a positive statute, every thing done in consequence of the prohibited act, will not, of course, be considered as void.

With respect to *smuggling*, or the offence of importing goods without paying the duties imposed thereon by the wisdom of the Legislature, it is in its very nature a transaction morally bad, and productive of various mischiefs to society; for the public revenue is thereby lessened, the fair trader injured, the nation itself impoverished, rival and perhaps hostile states enriched, and the persons themselves who are accustomed to this sort of wrong,

wrong, being hardened by a course of disobedience to, and defiance of the law, become at length so abandoned and daring, as not to hesitate at committing the greatest outrages; and if a partner in trade should be guilty of such wrong, without the privity or consent of his co-partner, it would be a violation of that faith and confidence which is so essential to partnership, even though the prospect of gain were ever so considerable without the hazard of a discovery; and if all the partners should knowingly engage in such illicit trade, they must be guilty of a breach of that law of nations by which the partnership contract was invented for the advancement and protection of fair and open trade. And whether such illicit trade be engaged in by an individual partner on the joint concern, or whether the whole firm happen to be present during the transaction, makes but little difference, for it has been decided often that in smuggling transactions all concerned must be considered as *participes criminis*, and partners are equally implicated in such wrongs.

By the statute 8^o *Annæ*, the penalty is treble the value, for goods that come to the hands of any one, knowing they had not paid the duties. And it seems to be established under this

this act^l, that if one of several partners is concerned in smuggling on account of the co-partnership trade, the Crown may come against any one of the partners for the whole penalty, it being in the nature of a *tort*, and not of a contract^m; just as in cases of *tort* a subject might come upon any one concerned in the *tort*. So it is where several persons are concerned in an act of this nature, though not all together when the act is done, yet every one may be prosecuted for the penalty separately; though at the same time the King can have but one satisfaction.

Thus we find judgment was given by the whole Court in the case of the King against *Richard Manning*ⁿ. This was an information by the Attorney General against the defendant, for that merchants unknown having imported 100 weight of tea, value 50*l.* and landed them in the port of *London*, the duties not paid or secured, the said tea came to the hands and possession of the defendant, knowing the duties not to be paid or secured; whereby he forfeited 150*l.* the treble value. The defendant pleads *non devenerunt*; and on

^l Stat. 8 Ann.

^m Bunb. 298.

ⁿ Comyn's Rep. 616.

a trial before Chief Baron *Reynolds*, a special verdict was found, That the 100 weight of tea was imported and landed, the duties not paid; that *Thomas Quoif* and the defendant, who knew that the duties were not paid or secured, bought the tea for 20 *l.* on their joint account, of one *Samuel Gibron*, of *Asbburnham* in *Sussex*, privately, but only a third of the money was paid by the defendant; that they afterwards carried it to *Cudham* in *Kent*, and there divided it into twelve parcels, and brought it on horses in sacks to a place near *London*, and thence carried it into *London*, by night, under their coats, to an inn in *White-chapel*, where, by the defendant's direction, it was put under a bed, on which the defendant laid himself down, whilst *Thomas Quoif* went out to see for a purchaser, to whom they sold it for 24 *l.* and the defendant had 8 *l.* the third part of that price, for his proportion of the tea.

That the value of the tea was 24 *l.* the treble value 72 *l.*; and whether the whole 100 lb. of tea came to the defendant's possession they submit to the judgment of the Court; and if the Court be of opinion that the 100 lb. of tea did come to the possession of the defendant, they find so; but if the

Court think that only a third part of it came to his hands, they find that a third only came to his possession.

By the statute 8 *Annæ*, c. 7. §. 17. if any goods whatever liable to the payment of duties shall be unshipped with intent to be laid on land, (the customs and other duties not being first paid or secured) or if any prohibited goods shall be imported, not only the goods shall be forfeit, but also the persons assisting or otherwise concerned in the unshipping thereof, or to whose hands the same shall knowingly come after the unshipping, shall forfeit treble the value thereof.

And it was insisted by Mr. *Strange*, Solicitor General, that the treble value of the whole 100 weight of tea was forfeit; for the defendant and *Quoif* having bought the tea on their joint accounts, the defendant had the possession of the whole, and partners in a wrong are answerable for the whole; and cited a case *Mic. 1721. Doe v. Butler*, on a *devenerunt*, where it was said, That the defendant having carried away for his share but four anchors of the 320 gallons of brandy and 200 gallons of wine, charged in the information, ought to be charged with no more than
what

what he carried away ; but by *Montague* Chief Baron, as the defendant was present when the whole quantity came on shore, he was liable for all, it not being material what he carried off himself ; and a verdict was for the King for the whole.

So in *Michaelmas* 1726. The *Attorney General v. Ambro. Burges*^o, on a *devenerunt* for 3000 lb. of tea, and 200 lb. of coffee, it appeared that the defendant had several partners in the goods, and that all did not come to the defendant's own hands ; but *Pengelly*, Chief Baron—As there appeared no distribution to be made between the partners, and they having a joint property, the possession of the persons to whose hands the goods came was the possession of the defendant ; and when several persons are concerned in a fact of this nature, though they are not all together when the fact is committed, every one may be prosecuted for the penalty separately ; that the receiving of the goods by the defendant's agents after the landing, was sufficient to charge the defendant ; and as all the partners acted their parts, they were agents for one another, and all chargeable. That where several were concerned in taking goods,

o Bunb. 223.

trover lay against any one ; and the King had a verdict for the whole quantity.

So in the cases, *The Attorney General v. John Palmer*, in *Pasch.* 1727.

The Attorney General v. Edward Carbeld, *Hil.* 1732.

The Attorney General v. Sweeting, in *Pasch.* 1727.

The Court took time to consider those cases, and after some days consideration, I was of opinion for the King, but not merely because the goods were bought on their joint account, for though joint-tenants *sont seisie per my et per tout*, yet to divers purposes each hath but a right to a moiety, as to in-feoff, give or demise, to forfeit or lose by default. *Co. Lit.* 180. a. If two purchase, and one is a villain, the lord can enter but into a moiety, or if one be an alien, the King, on office found, shall have but a moiety. If one joint-tenant be indebted to the King, but a moiety shall be extended; and if he die before any extent, no

extent shall be made on the land in the hands of the survivor. *Co. Lit.* 185. *a.*

If *A. B.* and *C.* are partners, and judgment and execution is sued against *A.* only his share of the goods can be sold. It is true, the sheriff may seize the whole, because the share of each being undivided cannot be known; and if he seize more than a third part, he can only sell a third of what is seized, for *B.* and *C.* have an equal interest with *A.* in the goods seized; but the sheriff can only sell the part of him against whom the judgment and execution was sued. So it was resolved by *Holt* and the Court, *Heydon and Heydon*, *Mich.* 5 *W. & M.* 9. So it was holden *per Holt*^r, and no Judge denied it; and *Pollexfen's* opinion accords. And in that case *Backburst* and *Clinkard*, 1 *Show.* 174. when a *scire facias* issued against *B.* after the seizure of all the partnership goods upon the judgment and execution against *A.* and the sheriff returned *nulla bona*, it was holden a false return; for *B.* had a share of the goods, and the possession

9 1 *Salk.* 392. *Holt* 302. *S. C.* 1 *Show.* 174. *Comyns* 277. 626.

^r *Holt* 643. *S. C.* 2 *Ld. Raym.* 871. 1 *Show.* 174.

continued in him, notwithstanding the seizure upon the execution against *A.*

But for the more explicit declarations of the grounds of my opinion, I do agree, first, That where several persons are engaged in a tortious act, all present and aiding and assisting in it are equally culpable, and liable to answer for the whole of the mischief done; and that where they are parties in the act, though not perhaps present at that particular branch of it for which he is charged. It is so in case of a robbery, burglary or other felony^s; and therefore if *A.* and *B.* engage in a robbery or burglary, and *A.* stands to watch while *B.* breaks open and robs the house, or while *B.* pursues and robs a person out of his sight, and if *B.* kills the man, *A.* is guilty of the murder. So it is if several come to do a trespass, to make an affray, rob a park, plunder a ship, or run prohibited or uncustomed goods, all engaged in the fact are chargeable with the whole doings, and all the consequences of it, if murder be committed by any of the company, though the rest were in other rooms, in other parts of the park, or know not what goods were taken or carried off by others, they are equally guilty; for in

^s Fost. 350.

the eye of the law they were all present aiding and assisting; and therefore if the defendant had been found guilty of aiding or assisting, or otherwise concerned in unshipping the tea, I should make no question but that he would have been liable to the penalty of the treble value for what he or any others at that time carried off, for they were all aiding, assisting, and concurring in the same tortious act.

And this is what was determined in the cases cited. In the case of *Doe and Butlar*, the Chief Baron *Montague* saith, The defendant was present when the whole came on shore, therefore it was not material what he carried off.

So was the determination by Chief Baron *Pengelly*, in the case of the *Attorney General* and *Burgefs*. All the partners acted their parts, and were agents one for another, and all chargeable.

It is said indeed before, the partners having a joint property, the possession of the persons to whose hands the goods came was the possession of the defendant; but this cannot be meant of a joint property by purchase, but

where several persons are parties in the *tort*. In running the goods into other hands, the possession of those into whose hands the goods came is the possession of the defendant, who was a party in the running of them, though he was not the particular person who brought the goods to the hand in which they were found; for so it is, added he, where several persons were concerned in a fact of this nature, though not all together when the fact is committed, yet every one may be prosecuted for the penalty separately ^t. This, or similar to this, must be the case to make all the expressions pertinent and consistent, if we have a full and right account of them.

So in the case of the *Attorney General v. Palmer*, which was on a *devenerunt* for 1000lb. of coffee. It was objected, that the defendant being hired with others for carrying the goods in the information, he was chargeable for no more than the two bags which he carried.

But it was answered by the Chief Baron *Pengelly* very rightly, that the defendant was a person to whose hands the goods came within the nature of the statute; for as all the

^t Carth. 171. Dyer 159. b. 160. a.

persons went together with one intent, the Crown might charge whom they would. All agents are to be charged, otherwise the act was not made full enough for the benefit of the Crown: and it appeared that the defendant had the whole charge of the goods for some part of the time. A private person may bring an action against any one, where several are concerned in taking his goods from him. He remembered an action against two for stranding a ship, when 200 were concerned, and a verdict there, and they paid the money.

So in the case of the *Attorney General v. Edward Carbeld*, on a *devenerunt*, for 6000 lb. of tea, which it was proved the defendant and others brought from the sea side at several times. It was objected, that the defendant could not be charged with more than the three horse-loads he carried, since the defendant had not the command of the rest, nor was their master. But it was answered, Where several are concerned in a joint design, they are all answerable, as in cases of costs and wrongs. In trespass, if several take away goods, all are answerable for the whole. The last case, the *Attorney General and Palmer* ^u,

^u Bunb. 223. n.

was cited, that the several prosecutions there could be but one recovery by the King; for if satisfaction was recovered from one for the whole, the others were discharged: if several are bound in a bond, all may be sued, but there can be but one satisfaction.

Per Chief Baron Reynolds. Where several are jointly concerned, it is a joint undertaking; they are liable for the whole, though the Crown can have but one satisfaction: and the King had a verdict for the whole.

A case was cited, P. 1727, *inter The Attorney General and Sweeting*, on a *devenerunt* for 1800 lb. of tea, 100 lb. of cocoa, 150 lb. of coffee.

Objection. The defendant was not chargeable within the words of the statute; for he kept a public-house, and was not responsible for the goods brought there by the guests; the goods belonged to another, and the defendant could not know but by hearsay that the goods were run.

But Chief Baron *Pengelly* was of opinion, that since the act made, not only the importer, but those to whose hands the goods came
after,

after, were liable to prosecution. The Crown might charge all to whose hands the goods came after importation; for the first might not be found, and if other persons could not be prosecuted, the act would be evaded; and where a person delivers run goods over to another, both are equally guilty.

And afterwards, viz. in *February 1738, Hil. 12 Geo. 2.* the Court gave their opinion. And it was agreed, first, That in all cases of *tort*, all persons present, aiding and assisting, are equally liable for the whole mischief done; and one shall not excuse himself by saying that he did but little part of the trespass; for in trespass there are no accessaries, but all aiding and assisting in it are liable.

So that in pulling down a house, plundering a ship, running goods, which are illicit and tortious acts, all are responsible for the whole damage done. And this is what was determined by Chief Baron *Montague*, *Doe v. Butlar*, the defendant being present, and helping to bring the whole on shore, was responsible for the whole, and it is not material what he himself carried.

So by Chief Baron *Pengelly*, in the cases of *The Attorney General v. Burges*, and *The Attorney*

torney General and Calver, That where several persons are concerned in a joint fact of this nature, though not all together when the fact is done, every one may be prosecuted for the penalty separately.

So Chief Baron *Reynolds* determined in the case of *The Attorney General and Carbeld*, where several are jointly concerned, and it is a joint undertaking, they are all liable for the whole.

Secondly, It is agreed, that where run goods come to the hands of any person knowingly, by this statute 8 *Ann.* such person is made liable to the same penalty of the treble value, although he is but in the nature of an accessory in receiving the goods, as well as the principal, who was assisting in the running and unshipping of the goods. But there is this difference between them; he who was present in helping the goods on shore, is a party in the illicit act itself, and therefore is chargeable with the whole; but he who receives any part of the goods after they are put on shore, is not a party to the original act, but is only culpable for what he receives, and consequently can forfeit only the treble value of the goods which came to his hands.

And

And I believe nobody would think it so consonant to justice, that the receiver of a pound of tea or coffee, which had not paid duties, should pay the treble value of 1000lb. which was run at the same time, which he knew nothing of. Our law is very cautious in extending punishment beyond its due proportion; and therefore in trespasss, *mayhem*, *præmunire*, &c. there are no accessaries; for accessaries before, by counsel or command, are in the same degree as principals; but the accessaries after, by receiving the offender, cannot by law be under any penalty, unless the statutes which induce the penalty expressly extend to receivers and comforters, as some do *. 1 *Hale's Hist. P. C.* 613.

Thirdly, It is agreed, That if a person be hired to carry goods which have not paid duties, knowing the duties unpaid, he is a person to whose hands the goods knowingly come, and consequently liable to the penalty of the treble value, otherwise the act might be easily eluded.

But there is a difference where a person is hired to help to convey the goods on shore, from him, who being present, and aiding and

* 4 Bl. Com. 36.

assisting in the unshipping of the goods, is party in the wrong, and liable as every principal actor to answer the whole damage.

And that was the case of the *Attorney General* and *Palmer*, wherein it was said, that all the persons hired went together with one intent to carry off the goods. If persons are hired to pull down a house, they are all trespassers. But if a porter be hired to carry a parcel of tea after the importation, which he knows was run, he is a person to whose hands that parcel came within the intent of the act, and will be liable to the treble value of that parcel: but I believe nobody will say that he is answerable for the treble value of the whole cargo.

Fourthly, So likewise if a keeper of a public-house receives the whole parcel, which any one of his guests, whom he knows to be a smuggler, brings to him, and takes it into his possession, and conceals it for him, he is a person to whose hands those goods came, and will be chargeable with the penalty of the treble value of what he so concealed, but not of the goods carried by other persons to other places.

So

So was the case of The *Attorney General* and *Sweeting*, and many subsequent determinations.

Fifthly, So likewise if a person buy any quantity of goods which he knows were run, and the customs not paid, he will be chargeable with the treble value of the goods so bought, for he is a person to whose hands the goods came; for though it was under the pretence of a contract, yet since he knew that the customs were unpaid, it was an illicit contract, and he becomes *particeps criminis* by receiving these goods; and the contract or purchase will no more exempt him than if he had bought goods of a pirate or felon, which alters not the property of them.

By the stat. 8 *Geo. 3. c. 18. s. 10.* Forasmuch as persons using clandestine trade, are greatly encouraged by many for private lucre, who buy and receive goods clandestinely imported; if any shall buy or receive any goods clandestinely run or imported before condemned, knowing the same so to be clandestinely run or imported, forfeits 20*l.* on conviction before a justice of the peace.

But suppose two persons join stock together, and buy goods on their joint account, and one is constant that the goods are run, and the other is not, (which was the present case, for it cannot be intended that *Quoif* knew the goods were uncustomed, unless it had been so found, for *fraus non est præsumenda*), I am clearly of opinion that the defendant is liable to the treble value, though *Quoif* is not; but then the question will be for what quantity he is liable; and I am of opinion, that if they had divided the goods after their purchase, that the defendant could be liable only to the treble value of his share, and no more, for no more came to his hand or possession; for though joint-tenants are seised or possessed *per my et per tout*, that is, they are so far possessed of the whole that none can say, till partition made, that this or that part is not in his possession^y, yet they in right and reality are possessed of no more than the proper share or purparty.

As therefore they give or dispose of no more, so neither can they forfeit any more^z.

^y *Vide supra* p. 260.

^z Co. Lit. 186. a.

If a villain and freeman purchase, the lord is entitled to what his villain is possessed of, yet he can enter into a moiety only ^a.

So if an alien and natural-born subject purchase, though the heir is entitled to all the alien was seised or possessed of, yet the heir, on office found, can have but a moiety.

The treble value of what comes to the defendant's hands is the measure of his penalty, but that must be meant of what really and truly comes into his possession, and not what notionally and virtually only can be said to be in his possession.

If partners be of goods, and execution be sued by *feri facias* against one for his separate debt, the sheriff may seize the whole in order to inventory and appraise them, and to have a true account of the value; but he can sell but the share of him against whom the *feri facias* was sued ^b, for the *feri facias* warrants him to levy *de bonis et catallis* of the one, and all may in some sense be said to be his goods, because he hath a joint interest in all, yet since he hath a right and possession of

^a *Supra* p. 260.

^b *Supra* p. 261.

a moiety only, the sheriff can dispose of no more ^c.

And notwithstanding such seizure of the whole, the other partner continues in possession of his share or moiety ^d; and therefore where *A. B. and C.* were partners, and upon a *feri facias* against *A.* the sheriff had seized the whole, and a *feri facias* came against *B.* and the sheriff returned *nulla bona*, it was resolved that an action on the case lay against him for the false return, for *B.* was still in possession of his third part of the goods.

However, as this special verdict is found, I think the whole cwt. of tea came to the defendant's possession, for it is said, that he took care of the whole, that by his direction it was put under the bed, and he lay down on the bed; so that apparently he had at one time the whole under his custody and care, and used endeavours to conceal it, knowing the whole to be uncustomed goods. What more does an inn-keeper or alehouse-keeper do, who takes the goods of a smuggler to lay up and conceal?

^c 1 Salk. 392.

^d 1 Show. 74.

So it was determined in the case of *The Attorney General and Sweeting*, 1727, and many times since.

A joint-tenant may make his companion his bailiff, and maintain account against him as such. *Co. Lit.* 186. a. Here *Thomas Quois* intrusts the defendant with the goods to conceal and secure them; suppose he had embezzled them, would he not have been chargeable by his companion for them? And if so, he must have possession of them.

It is not necessary that he to whose hands goods came should have the absolute possession in them. If a man delivers money to a servant to carry, and he is robbed of it, the servant may maintain an action against the hundred, and declare that he was possessed *ut de bonis suis propriis*.

So it was resolved 4 *Mod.* 303. And yet the possession is not divested out of the master, for he may bring an action if he pleases^e.

And although smuggling be an offence against the laws, yet still may partners in

Comb. 263. *Holt* 37. 12 *Mod.* 54. S. C.

trade subject themselves not only to the penalty incurred, but also make themselves liable to the bankrupt laws thereby, for *per Lord Hardwicke* “A person who has dealt
“merely in smuggling and running of goods,
“though this is an offence, and contrary to an
“act of Parliament, yet still it will be a trading
“within the meaning of the bankrupt acts,
“and such trader is liable to a commission ^f.”

1 Atk. 199. Cooke's B. L. 67.

CHAPTER X.

How far Partners are bound in respect
of Contracts affected by Usury.

IT has already been pointed out that in order to make a man liable as a partner there must either be a contract between him and the ostensible person to share jointly in the profits and loss, or he must have permitted the other to make use of his credit, and to hold him out as one jointly answerable with himself ^a.

But if a contract be entered into between parties, which is in itself immoral, or a violation of the general laws of public policy such as being affected by usury, that does not amount to a partnership contract within the legal principles established respecting joint traders, and the parties themselves are not legally bound by such an unconscionable bargain. For example ;

If an agreement purporting to be, or assuming the shape of, a partnership in trade,

^a Cowp. 793.

be contracted for a single dealing, and one of the partners shall advance a sum of money for the purchase of particular goods, stipulating at the same time to have *half the profits* upon a re-sale of such goods, which profits exceed 5 l. per cent. and the principal not risked, the bargain being *unconscionable*, is said not to be binding.

Thus in the case of *Jestons v. Brooke* b; where A. in consideration of advancing 45 l. for which he took the borrower's note of hand, payable on demand, stipulated to have half of the profits upon a re-sale of certain goods intended to be purchased by the borrower with the money; *two hours* after the purchase, A. demanded payment of the note; and the same night put a person into possession jointly for himself and the borrower. The neat profits upon a re-sale were 5 l.

The bargain was held to be *unconscionable*; and therefore A. was not allowed to recover his share of the profits in *an action for money had and received*.

This was an action for “*money had and received* :” And upon a rule to shew cause why

^b Cowp. 793.

the verdict obtained for the plaintiff should not be set aside, and a nonsuit entered in its stead,

Lord *Mansfield* reported as follows:—
“ The plaintiff and defendant were both brokers: the defendant wanted to purchase a parcel of goods, which had been distrained for rent, but had no money. He applied therefore to the plaintiff, who on the 12th of *November* 1777, lent him 45 *l.* upon his note of hand, payable on demand. At the same time it was agreed, that the plaintiff should have half of the neat profits, which should be made of the goods upon the re-sale of them, over and above the note of hand. Two hours after the sale, payment of the note of hand was demanded by the plaintiff, in order to force the defendant to sell the whole of the goods to him; and as an inducement, the plaintiff offered him 3 *l.* profit, which the defendant refused, and sold the goods after for 5 *l.* profit. The plaintiff paid the 45 *l.* to the landlord, by the direction of the defendant, and put a man into possession on the night of the sale. The note was re-paid on the 21st of the same month. This action was brought for 2 *l.* 10 *s.* the half of the neat profits for which the goods were re-sold. To-

wards the end of the cause, it struck me that this contract was usurious on the part of the plaintiff, because he was to have half of the profits, and was to run no risk. The jury found a verdict for the plaintiff, subject to the opinion of the court, upon the question, whether this contract was usurious or not? If the court should be of opinion that it was, then the verdict was to be set aside, and a nonsuit entered in its stead."

Mr. *Wallace*, in support of the verdict, argued, this was not an usurious contract, 1st, Because there was no certainty upon the original agreement of any interest beyond 5 *per cent.* but the whole rested in contingency, upon what would be the neat profits arising from the re-sale of the goods; and if there had been no profit at all, the plaintiff would have had no interest whatever. It is true, a mere colourable contingency will not aid a contract, where by the very terms of the agreement usurious interest is reserved: but in the present case, it could not be known what the profits of the sale would be: it depended upon the defendant's meeting with a good purchaser, and upon the money being collected in. It might happen that the goods should sell at a loss. The contingency therefore was
real,

real, not colourable only ; consequently not within the statute. 2d, To make a contract usurious, illegal interest must be reserved by the very terms of the contract : whereas, in this case, the note of hand given by the defendant bore no interest at all. Therefore he prayed the rule might be discharged.

Mr. *Howarth*, *contra*, in support of the rule insisted that the transaction was clearly usurious. All that is essential to make a contract usurious, is, that it should be for a loan, with a reservation of more than 5 *per cent.* interest, for forbearance of the principal. Here, the principal was secured by a note of hand, payable on demand ; consequently the plaintiff run no risk. In addition to this, the plaintiff at the same time stipulates for half of the neat profits upon a re-sale of the goods ; which it appears, far exceeded the rate of legal interest. It is material too in this case, that the plaintiff who had viewed the goods, must, from his occupation, necessarily have known what they were fairly worth. If the contract is a loan, and the intention is to get more than legal interest, no shift or contrivance can take it out of the statute. A contract is not less usurious, because no interest is reserved upon the sum advanced : If something also, as a
horse,

horse, &c. the value of which exceeds the legal rate of interest, is substituted in its stead. Therefore he prayed a nonsuit might be entered.

Lord *Mansfield*.—This is an action for money had and received; and therefore it is analogous to a bill in equity. The ground of the action is, to recover half of the neat profits arising by the re-sale of certain goods purchased by the defendant, as stated in the report. The general question is, “Whether the plaintiff ought to recover in an action for money had and received?” That is, “Whether it **is** against conscience the defendant should **retain** the whole profits of the goods in question to himself?” There are two grounds, either of which is an answer to the action: 1st, If the contract be usurious within the statute: or, 2d, Though not usury within the statute, if it be an unconscionable bargain. You all remember where the court held a case not within the statute of usury; I mean the case of the wire-drawers^c. The ground of the action there was, that the plaintiffs, who were gold refiners, had advanced gold-wire to others in the same trade, upon the terms of paying such a price, if the mo-

^c Cowp. 112.

ney was paid within three months; and if not, then to pay at the rate of an halfpenny an ounce per month, over and above the price agreed for: which in fact, upon calculation, amounted to above 5 *per cent.* This, at the trial, was proved to be the constant usage of the trade. An objection was made on the part of the defendant, that it was usurious. A verdict was found for the plaintiff, and a question reserved for the opinion of the Court, Whether this contract was usury? And under all the circumstances, especially the constant usage, the Court were of opinion it did not amount to usury within the statute. Some time after, an action was brought for money had and received, upon a similar contract, "to recover the surplus of the halfpenny an ounce^d." The defendant paid into court the principal and interest at 5 *per cent.* from the time of the bargain, and offered to pay costs down to the action brought: And the single question was, "Whether the excess of interest should be paid?" It appeared manifestly at the trial, that this excess was only to be taken in case of delay of payment at the end of three months, and for no other reason whatsoever; and the vendee was at liberty to have paid the principal at the expi-

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^d Cowp. 116.

ration

ration of that time. I ruled at *Guildhall*, that the transaction ought to be considered as not usury within the statute. But the law of the land having declared that 5 *per cent.* was sufficient for delay of payment, I was of opinion that the demand of the surplus was an exorbitant demand, and therefore ought not to be recovered in an action for money had and received. The jury accordingly found a verdict for the defendant, and that opinion was acquiesced in without any new trial being moved for.

But to consider this case first, in the light of an usurious contract. There is no contrivance whatever, by which a man can cover usury. Here are two brokers. One, who is the defendant, wants to buy goods that were upon sale; and the other agrees to lend him money for that purpose; but he is to lend it upon the terms of being paid both principal and interest from the time the loan commenced. It is true, no rate of interest is reserved in the note; but it is made, payable on demand. From the moment of the demand therefore, it would carry interest; and the plaintiff had it in his power to make demand, the very instant the bill was delivered. Besides this, he does not even trust the defendant with the
possession

possession of the money in his own hands; but when the goods are bought, and not *before*, he pays the money to the landlord for the defendant. Within two hours after, he demands the money, and then the note begins to carry interest. He was not bound by the agreement to give credit for a moment. So that there was no sort of risk whatsoever; and in fact, as soon as the money was paid, a man was put into possession for himself, as well as for the defendant. The note therefore, was payable with interest from the time of demanding payment, and he has possession of the goods. That was manifestly with a view to secure to himself the surplus advantage which he had stipulated for, upon a resale. Both parties from their situation knew there would necessarily be a profit. It seems to me therefore, that the intention of the contract was to get more than principal and legal interest upon the note, which is usury within the meaning of the statute. But suppose it were not strictly usurious, shall a man in an action for *money had and received*, which is an equitable action, and founded in conscience, recover such an unmeasurable and exorbitant demand as this is? Most clearly he shall not. Therefore upon either ground
the

the verdict must be set aside, and the nonsuit entered.

Willes Justice.—I am of the same opinion.

Ashburst Justice.—I think that upon the original contract, it must be understood, the plaintiff was to have no interest, and therefore the contract itself was not usurious. But having broken the faith of that agreement, by making an immediate demand of payment, and thereby entitling himself to interest, I am of opinion he has precluded himself from demanding a share of the profits of the sale likewise; for it is against conscience that he should have both.

Baller Justice.—Whether this be usurious or not, it is clearly great oppression. Lending money is giving credit. And here, the consideration was, that the plaintiff should have half the profits of the sale. But instead of giving credit, he demands the money immediately. The consideration therefore is at an end.

Per Cur. Let a nonsuit be entered.

So

So upon the same ground of reason, if the borrower of money give a bond for the principal and interest at 5 *l. per cent.* and covenant at the same time also to pay to the lender a certain portion of profits of trade, this is an usurious contract, and the obligee cannot recover on the bond; for in such an agreement provision being made to receive the profits only, and not to engage for the losses of the trade, it is contrary therefore to the principle upon which the partnership contract must be founded, namely, reciprocal advantages, and must consequently be deemed a contract not binding upon the parties. Thus in the case of *Morse* against *M. Wilson*^e, which was an action of debt on bond for 4000 *l.* The defendant, after craving oyer of the bond, which was a joint and several bond by the defendant *Matthew* and *Harry Wilson*; and of the condition, which was that the bond should be void if the defendant, or *Harry Wilson*, should pay 2000 *l.* with lawful interest for the same at 5 *per cent.* pleaded, that before the executing of the bond *Harry Wilson* was possessed (amongst other things) of two shares, calculated to be of the value of 1000 *l.* each share, in a brewhouse situate, &c. and which brewhouse and the business thereof were then oc-

* 4 Term Rep. 353.

cupied and carried on by him and one *William Cator* and *Francis Jefferies* in partnership together, under the firm of *Cator and Co.* which two shares were thereafter expected to produce a large surplus of profits to *Harry*, over and above what would be sufficient to satisfy and pay the interest of 2000 *l.* after the rate of 5 *l. per cent.* for the forbearance; and thereupon, on, &c. at, &c. it was corruptly, and against the form of the statute in such case made and provided, agreed by and between the plaintiff and *Harry Wilson*, that the plaintiff should lend to the said *Harry* 2000 *l.* and should forbear and give day of payment thereof to the said *Harry* until and upon the said 11th day of *June* 1789; and that for such forbearance and giving day of payment of the said 2000 *l.* the said *Harry* should pay to the plaintiff not only interest for the said 2000 *l.* for and during the time of such forbearance, after the rate of 5 *l. per cent.* but also such surplus profits as should arise during the time of such forbearance on the said two shares, after 5 *l. per cent. per annum* for the said 2000 *l.* should be paid; and that for securing the re-payment of the said 2000 *l.* with interest, at the rate of 5 *l. per cent. per annum*, the said *Harry* and defendant should execute the bond, &c. and that for securing the payment
of

of such surplus profits as aforesaid, the said *Harry* should make and subscribe a certain writing, bearing date the 11th *June* 1788, purporting that in consideration of the said 2000 *l.* received by the said *Harry* from the plaintiff, he the said *Harry* for himself, his executors, &c. made over to the said plaintiff, his heirs, executors, &c. the said two shares, &c. (that is to say) that after 5 *l. per cent.* was paid on the said capital of 2000 *l.* such surplus as should arise on the said two shares, which was calculated at 1000 *l.* each share, should be *bona fide* the property of the plaintiff, and should be paid to the plaintiff on demand; and covenanted that on the 24th of every month of *June*, during the time the said *Harry* should be in possession of the said 2000 *l.* he would produce the full and true accounts of the profits, such as were made up by the said *Harry* and his partners, &c. The plea then stated that the plaintiff afterwards, (to wit) on, &c. at, &c. and in pursuance of the said corrupt agreement, lent to the said *Harry* the said 2000 *l.* and forbore and gave day of payment thereof to the said *Harry*, until and on the said 11th of *June* 1789; and that after the making of the said corrupt agreement, and in pursuance thereof, and for securing the re-payment of the said 2000 *l.*

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with

with interest at the rate of 5 *l. per cent. per annum*, (to wit) on, &c. at, &c. the said *Harry* and the defendant executed the bond, &c. with the said condition thereunto subscribed; and that in further pursuance of the said corrupt agreement, and for securing the payment of such surplus profits as aforesaid, afterwards, (to wit) on, &c. at, &c. the said *Harry Wilson* made and subscribed a certain writing, bearing date the said 11th of *June* 1788, according the purport and effect in that behalf aforesaid; the defendant then averred that the surplus of the profits so agreed to be paid by the said *Harry* to the plaintiff, together with the interest, so agreed to be paid by the said *Harry* to the plaintiff, and so secured by the bond and the writings so made, &c. exceeded the rate of 5 *l. per cent. per annum*, contrary to the form of the statute, &c. by means whereof the bond is null and void. To this there was a demurrer; stating for cause that it did not appear that there were any surplus profits arising during the time of the said forbearance on the two shares in the plea mentioned; or that any thing by the said agreement agreed to be paid by the said *Harry* to the plaintiff, together with the said interest, so agreed to be paid by the said *Harry* to the said plaintiff, and so secured by the bond, exceeded

ceeded the rate of 5 *l. per cent.* for the forbearance of each 100 *l. per annum*, contrary to the form of the statute, &c. joinder in demurrer.

Chambre, in support of the demurrer, contended that this contract was not usurious; for although the plaintiff was intitled to the surplus profits of the two shares, in addition to the 5 *l. per cent.* on the money lent; and although as between him and the partners he was not answerable for the losses in the trade, yet to all the rest of the world he was responsible for the partnership debts, and thus his principal was in hazard. And it is essential to the crime of usury that the principal, upon which more than legal interest is reserved, should not be put in hazard^f. The distinction taken by *Dodderidge J.* in *Cro. Jac.* 508. has always been considered as the rule upon which questions of this sort must be decided. If I lend 100 *l.* to have 120 *l.* at the year's end upon a casualty; if the casualty goes to the interest only, and not to the principal, it is usury; for the party is sure to have the principal again, come what will come: but if the interest and principal are both in hazard, it is not then usury. If it be objected that by the terms of this contract the prin-

^f Lord Chesterfield v. Janssen, 2 Will. 286.

capital is secured at all events; the answer is, that it is no farther secured in this case than in the case of every sleeping partner, who receives 5 *l. per cent.* on his own share of the capital, besides his proportion of the profits. And it is immaterial whether there be or be not a clause in the agreement to subject such sleeping partner to the partnership debts, because the law annexes such liability to the right of receiving the profits of the trade.

The question relative to secret partners, was very fully considered in *Grace v. Smith* 8, where a partner, who retired from trade, left a sum of money in the business, for which he was to receive a certain annuity, over and above his 5 *l. per cent.* and the Court held that he could not be considered as a secret partner, because it would be unjust to subject a party to the indefinite losses of trade, from which he could only receive a stipulated profit. But here, as the plaintiff is entitled to the whole amount of the profits of the two shares, he must be responsible to the world for the losses.

In the case in *Blackst.* another of *Bloxham* and *Fourdrinier* is cited, which is much strong-

er than the present; where *Pell*, who retired from business, left a sum of money behind, and took a bond from *Brooke* his partner to secure an annuity of 200 *l.* for six years, over and above 5 *l. per cent.* for his money, *in lieu of the profits* of the trade; and this Lord *Mansfield* held made him a partner. Now here the plaintiff was entitled to the *profits themselves*.

Dallas, contra, was stopped by the Court.

Lord *Kenyon*, Ch. J. Nothing can be clearer than this case. The plaintiff, without having any partnership in contemplation, lent 2000 *l.* to *H. Wilson*, for which he was to receive not only 5 *l. per cent.* interest, but also such surplus profits as should arise from these two shares in the business, he himself not being bound on the other hand to make good to the partners any part of the losses which the trade might sustain. The simple question is, whether this is not an agreement to receive more than the 5 *l. per cent.* allowed by law for the forbearance of a loan? Most unquestionably it is; and it is therefore void. It has been argued however that this was not an usurious contract, because the principal was put in hazard, as it was liable

to the partnership creditors: but it was no farther hazarded than in the case of every other loan, namely, by the risk of the borrower's insolvency; for as between the plaintiff and the partners in the business, he was not liable to contribute to the losses in the trade.

Ashburst, J. Where on the face of the contract itself the principal is in hazard, as in bottomry bonds, the lender may reserve more than 5 *l. per cent.* interest, without incurring the guilt of usury. But where the principal is secured at all events, and yet more than 5 *l. per cent.* may be got by the terms of the contract, it is usurious: and such is the present case.

Buller, J. In this agreement provision is made to receive the profits, but none to engage for the losses, of the trade. And therefore it is not true that the plaintiff's principal was at stake; since by the terms of the contract the trade is to be carried on by the other partners, and the plaintiff is only liable to make good the losses of the trade in the event of the insolvency of the other partners. But as between these parties, if there be any losses, they must be borne by the defendant and the
other

other partners; and if there be any profit, the plaintiff is to receive his proportion of it.

Grose, J. declared himself of the same opinion.

Judgment for the defendant.

In all partnership contracts where money is furnished by one side only, if the *casualty* goes to the *interest* of such money only, and not to the principal it is *usury* ^h, and the lender is precluded from recovering any thing in an action at law founded upon such an usurious contract, nor can the parties be considered as bound by such contract. But at the same time, to make a contract usurious, there must be a *loan* of money, wares, merchandize or other commodity, to be re-paid and restored to the lender with higher interest than the statute allows; it is essential that the thing *lent* is to be returned, for it cannot be a *loan* unless the money or thing borrowed is to be restored; the making illegal interest precarious, if the loan of the principal money or thing is to be restored, will not take it out of the statute; nor will any other shift or

^h 1 Term Rep. 200.

ⁱ 3 Will. 395.

contrivance whatever. In the case of *Roberts v. Trenayne*, Justice *Dodderidge* took these differences in cases of *casual usury*. First ^k,

If money be lent on a *risk* at more than legal interest, and the casualty affects the *interest* only, it is usury; for the party is sure to have the principal again at all events; but if the interest and principal are both in hazard, it is not then usury: and it was therefore adjudged in the common pleas, in *Dartmouth's* case ^l, where one went to *Newfoundland*, and another lent him 100*l.* for a year to victual his ship; and if he returned with the ship, he would have so many thousands of fish; and expresses at what rate, which exceeded the interest allowed by the statute; and if he did not return, that then he would lose his principal; it was adjudged to be no usury.

^k Cro. Jac. 508. Cro. Eliz. 27. 643. 741. 1 Lev. 54. Hard. 518. 1 Bullt. 36. 1 Sid. 182. 2 Ch. Ca. 130. Vern. 263. 1 Vez. 164. 2 Burr. 704. 3 Bac. Abr. 681. 692. 1 Hawk. P. C. 531. 3 Term Rep. 531.

^l Cro. Jac. 209.

Thus

Thus in the case of *Martin v. Abdee*^m it was agreed, that if principal and interest be in hazard upon a contingency, it is no usury, though the interest do exceed the allowed rate of interest. And when there is a hazard that the plaintiff may have less than his principal, it is no usury.

And it is also established, that a loan at more than the legal rate of interest is not usury, if by the re-payment of the principal, the borrower may avoid the interestⁿ.

Thus *Dodderidge* Justice in the case of *Roberts v. Trenayne*^o. Secondly, "If I secure both interest and principal, if it be at the will of the party who is to pay it, it is no usury: as if I lend to one 100*l.* for two years, to pay for the loan thereof 30*l.* and if he pay the principal at the year's end, he shall pay nothing for interest, this is not usury; for the party hath his election, and may pay it at the first year's end; and so discharge himself."

^m Show. 8. Comb. 125. S. C. Carth. 67. S. C. Holt 738. S. C. Salk. 390. S. C.

ⁿ 5 Co. 69. b.

^o Cro. Jac. 509. 1 Atk. 342. 351. 1 Vent. 254. 1 Sid. 37. 5 Bac. Abr. 408. 1 Hawk. P. C. 532. Cowp. 113.

Upon

Upon the very same principle also it has been held, that a bond in the penalty of 200*l.* conditioned for the performance of articles of partnership, ought not to be considered an usurious contract.

Thus in the case of *Morisset v. King* P, which was an action of debt on bond, in the penalty of 200*l.* conditioned for the due performance of certain articles of partnership; which articles recited that *Mary Morisset* had lent *Daniel King* the sum of 100*l.* to be repaid to her at the end of four years, *without interest*; but in consideration that the said *Daniel King*, his executors and administrators, should find and provide for *Mary Dubois* daughter of the said *Mary Morisset*, (the obligee), meat and drink in the house where he dwelt or should dwell, for four years, if the said *Mary Dubois* should so long live; and that she should, during the said term, board with him, and that she should be co-partner with *Mary King*, wife of the said *Daniel King*, in the business of a millener; and should all that time bear one moiety of the losses, charges, (except house-keeping), shop-rent, and materials necessary

for carrying on the trade, (which the said *Daniel King* did agree to provide); and they should be partners, and each do their utmost to carry on the trade; and should equally divide the *profits*; and also that the said *Daniel King* should lodge the said *Mary Morisset* she paying him 10*l.* a-year. And at the end of the four years *Daniel King* was to re-pay the 100*l.* And in case of the death of the said *Mary Dubois*, to pay the principal, together with *lawful* interest, for the 100*l.* to the said *Mary Morisset*. The defendant after having demanded and had oyer of the condition of this bond, and of the articles therein recited, pleads, “That this was a corrupt agreement;” with an averment “That the board of *Mary Morisset* (the mother) was worth 20*l.* a-year; and the board of *Mary Dubois* (the daughter) was worth 10*l.* a-year.” To this plea the plaintiff demurred.

The only question was, Whether this was an *usurious contract*, within the statute of *Ann. 9* which makes void all bonds, contracts, and assurances, where more than 5*l.* *per cent. per annum* is directly and indirectly taken for any loan.

Mr. *Aspinall* argued, as counsel for the plaintiff, and Mr. *Wedderburn* for the defendant.

The Court were extremely clear that this case could not be within the statute of usury.

Lord *Mansfield* observed, “ It is impossible to say that *King* might not receive so much advantage by this partnership, as to be worth the consideration. It might be a very advantageous bargain to *King*: there might be commendation, skill, labour, or other benefits arising to him from it. He mentioned the case of Mr. *Hubert*, who entered into a private secret partnership with *Nelson*, who drew him into a bankruptcy thereby^r.

So here the plaintiff’s daughter might have been drawn into a bankruptcy, by means of this agreement; which would have been more severe to her, perhaps, than the penalty of this statute of usury would be.

Mr. Justice *Foster* and Mr. Justice *Wilmot* concurred with the Chief Justice. They said

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it did not explicitly appear whether this was a prudent agreement or not; but it might be beneficial to *King* upon the whole; at least it was not such a contract as could be adjudged by the Court to be usurious within the statute.

Judgment for the plaintiff.

CHAPTER XI.

Partnership—

Accounts, how to be settled between Partners.

WHEN an account is to be taken between partners, each is entitled to be allowed against the other every thing he has advanced or brought into the partnership concern, and to charge the other partner in account, with what that other has not brought in, or has taken out more than he ought ^a.

Thus in a case ^b, where there were two partners, and one had taken out more money from the partnership stock, than his share amounted to, and therefore became a debtor for so much.

Lord Chancellor *Talbot* was of opinion, that the partnership creditor had a right to come upon the separate estate of the partner, who was so indebted.

^a Cowp. 471.

^b Ex parte Drake cited 1 Atk. 225. 2 Ch. Rep. 226. S. P. 16 Vin. Abr. 242. Cooke's B. L. 612.

'Tho'

Tho' length of time is no bar between merchant and merchant, whilst their accounts are going on, yet dealings having ceased many years between them, and, after disputes there having been an acquiescence till the death of one of them, the Court of Chancery will not decree an account with the survivor, but leave the plaintiff to his remedy at law ^c.

Where *A.* and *B.* partners in trade stated their account, and *A.* gave *B.* a note for the balance, but at the same time promised to rectify any error or mistake in the account; *B.* obtained judgment against *A.* on the note at law; and the Court of Chancery decreed a new account concerning their stock and trade, and payments and receipts, and each to produce their books of account on oath, and what should appear due, to be paid with interest when and where the Master should appoint ^d.

A bill ^e is for an account by *A.* a merchant against *B.* a merchant who was his partner. Defendant pleads, that the dealings concern-

^c 2 Vern. 276.

^d Fin. R. 431. Vin Abr. 247.

^e Bridges and Mitchell, Gilb. Eq. Rep. 224.

ing which plaintiff prays an account, were transacted above twenty years before the bill brought; and pleads such acquiescence without suit, and also the statute of Limitations in bar of the account.

Per Cur. Forbearance of suit for twenty years will in equity be a good bar though between merchant and merchant.

It is not necessary for the defendant in such a bill to aver in his answer, that he did not promise within six years to account, &c. unless particularly charged in the bill; as was resolved in *Bodvil* and the Bishop of *Meath*^f, and said *per cur*' in the above case,

And though the statute of Limitations has been always construed to except accounts open between merchant and merchant, yet that is to be understood with this distinction, that if open accounts be by subsequent acts continued, they are not barred by the intervention of such length of time from the original transactions; but if such an account is by the plaintiff deserted, in such case it is

^f Gilb. Eq. Rep. 225.

^g Cooke's B. L. 608.

barred,

barred, exactly as if it had been formally closed; and is taken to have been so.

And in a matter *ex parte Grill* ^h joint assignees were not permitted to prove against the separate estate, the balance of a long account due from the partner to the partnership.

A. a clothier and *B.* a dyer, had mutual dealings in their way of trade, which were carried on for several years without payment of money on either side, but the debts on one side were paid off against the debts on the other. *B.* was otherwise indebted to *A.* and on stating accounts in 300*l.* for which he made a *mortgage*, and afterwards owed *A.* 200*l.* for which he gave bond and judgment: *B.* dies intestate, and indebted to others by specialties, who as principal creditors take out administration, and finding several sums due from *A.* sue him at law ⁱ.

On a bill by *A. Macclesfield C.* decreed an account, and that *A.* should be allowed on discount what was due to him from *B.* and his costs ^k. And his Lordship said, that though

^h 2 Eq. Abr. 9. pl. 8. 1 P. Wms. 325. 2 P. Wms. 128. 1 Atk. 228. cited 8 Vin. Abr. 560. Blac. R. 653.

ⁱ Prec. Cha. 580.

^k Cooke's B. L. 608.

generally stoppage was no payment, yet in cases of this nature, where it appeared that the mutual dealings between the intestate and plaintiffs were carried on for several years in this manner without payment of money on either side, it was a strong presumption of an agreement to that purpose, and that otherwise they would not so long have continued their dealings: that it was the constant usage between merchants and traders. That the statute of bankrupts directs accounts to be taken in such manner, that if there be but the least handle for directing an account, so as to set off the other's debts, it ought to be done; as if even in the case of a bond the interest had not been paid, but cast up and allowed in goods, this would intitle them to retain the whole against each, as the account should come out¹. For a man cannot stop his *rent* for money owing to him, or a *bond* towards satisfaction of a simple *contract debt*. *Per Lord Macclesfield, ibid.*

Four bookfellers entered into partnership for carrying on a joint trade^m, and being then in *Holland*, according to the custom of the country, appeared before a Notary, and executed articles of copartnership, declaring jointly and

¹ Prec. Cha. 582.

^m 2 Eq. Ca. Abr. 111.

separately,

separately, that each had advanced 24,600 guilders, total 98,400 guilders, which sum was to pay all the debts they had then contracted, as mentioned in an inventory; but no debts should be paid not mentioned in the said inventory, nor any debts which either of the copartners might contract on his own private account: that a sum agreed on between them should be allowed for maintenance; and that all loss and gain should be equally shared and borne, with other usual covenants.

The copartnership was carried on from *Nov. 1725* to *May 1728*, when one of the partners, for a sum agreed to be paid him, quitted and released his claim to the other three, between whom the articles were continued and carried on, on the first footing; and one of them was intrusted with the goods in shop and warehouse.

But he became profuse, and embezzled the copartnership stock, and applied the same to his own use, and suffered the partnership debts to be unpaid; and having contracted private debts on his own account, became a bankrupt, and a separate commission was taken out against him. The messenger took possession of the partnership goods, and the commission-

ers executed an assignment to the defendants, who in consequence thereof took possession of the partnership goods and books, and received several of the partnership debts, and were getting in the rest, with an intention to apply them to the payment of the separate creditors; whereas the goods are copartnership goods, and ought to be applied to the copartnership debts, and to make the plaintiffs satisfaction for what the bankrupt had embezzled for his own separate use, and the residue to be divided into equal parts, two thirds to the plaintiffs, and one third to the bankrupt, to which he is entitled, and is to be part of his separate estate. This was the prayer of the plaintiff's bill, and that the defendants might be restrained from selling any part without the plaintiff's concurrence.

The assignees admit the bill, and the articles, that they have taken possession and sold some of the stock without consent of the plaintiffs, and set forth an account in the schedule to their answer, of the stock, and submit to apply the estate as the Court shall direct; and his Lordship was pleased to decree as follows:—

1st, That it should be referred to the Master to take an account of the partnership debts received by the plaintiffs in *Holland*.

2d, To take an account of the partnership estate in *England*, received by the assignees, or any for their use.

3d, To take an account of the partnership debts owing by the bankrupt and the plaintiffs.

4th, To cause an advertisement for the joint-creditors of the bankrupt and the plaintiffs to come in and prove their debts.

5th, To take an account of what embezzlements the bankrupt has made of the copartnership estate; and in taking accounts, plaintiffs and defendants to be examined on oath, to produce all books, papers, &c. and to have all just allowances.

6th, That what the Master shall certify the copartnership debts shall amount to, shall, in the first place, be paid by the plaintiffs and defendants to the joint-creditors in proportion to their debts, as far as the copartnership estate in their hands will extend.

7th, That if it shall appear any of the partnership estate remains in the plaintiffs and defendants hands, after the partnership debts are paid, then the Master to divide the same into three parts.

8th, And the plaintiffs are to take two thirds, and out of the bankrupt's one third part, they are to take what it shall appear he has embezzled of the partnership estate.

9th, And if there shall be any residue of the bankrupt's third part, after the partnership debts, and the bankrupt's embezzlements are satisfied, then the same is to be paid to, or retained by the assignees for the benefit of the bankrupt's separate creditors.

10th, The Master may state any thing specially; and all parties are to be paid their costs of this suit out of the copartnership estate, to be taxed by the Master.

Items in a partnership account, relating to the particular interest of a book-keeper, will not be supported in a court of equityⁿ.

ⁿ Atk. 141.

Lord Chancellor *Hardwicke*. " Though this Court have gone a good way in supporting a book of accounts which relates to a partnership, yet I do not know any instances where they supported *items* in such a book that relate to the particular interest of the officer, deputed by the partners, to keep this general book of account separate from the partnership affairs."

If *A.* and *B.* have a general running account, consisting of bills drawn by *B.* on *C.* in favor of *A.* and of bills and other securities deposited by *A.* with *B.* and upon the failure of *B.* and *C.* *A.* is obliged to take up the bills received by him from *B.* whereby the balance of the accounts is in favour of *A.* still he cannot maintain trover for the bills deposited by him with *B.* unless they were specifically appropriated to answer *B.*'s drafts on *C.* in favor of *A.* and deposited for that purpose expressly ^o. And it hath lately been so decided in the case of *Bent* and Another v. *Puller* and Others, assignees of *Caldwell* and Co. ^p

^o 5 Term Rep. 494.

^p Vide *Tooke v. Hollingsworth*, 5 T. R. 215.

Where persons in trade have been connected in various partnerships, and a joint commission taken out against them all, an order has been made for keeping distinct accounts of the different partnerships, as well as the separate estates of each partner⁹.

In 1771, *Thomas Petit* had separate creditors.

In 1772, *Petit* and *Flight* became partners.

In 1781, *Petit*, *Flight* and *Runnington* became partners.

In November 1785, a commission of bankrupt issued against the last three.

This was a petition for separate accounts of the three estates. Though the Court did not know any instance, of dealing in the firm of two partners forming part of the firm of three, the prayer of the petition was granted, and it was ordered that it be referred to the major part of the commissioners, named in the commission issued against the said bankrupts,

⁹ Ex parte Marlin, 2 Bro. 15.

rupts, *Thomas Petit*, *John Runnington*, and *Richard Flight*, to keep distinct accounts of the joint estate and effects of the said bankrupts, *Thomas Petit*, *John Runnington*, and *Richard Flight*, and of the joint estates and effects of the said *Thomas Petit*, and *Richard Flight*, and of the separate estates and effects of each of the said bankrupts; and that the several creditors on each of the said several estates, be admitted to prove their respective debts under the said commission against the said bankrupts, *Thomas Petit*, *John Runnington*, and *Richard Flight*; and that each of the said respective estates be applied, in satisfaction of the creditors of each respective estate, after full payment and satisfaction of the debts on such estate, be carried over to and constitute part of the joint estates of the said bankrupts, and the costs of this application to be paid out of the joint estates of the said three bankrupts; and the costs of keeping the said several distinct accounts were directed to be borne and paid out of each of the said respective estates, according to the proportions which in the judgment of the said commissioners, the same ought to be borne and paid by each of the said estates.

But,

But, on the other hand, when there have been various partnerships, and a joint commission is taken out against one firm, in which some of the parties were not engaged, there can only be the common order for keeping the distinct accounts of the joint and separate estate; therefore^r, when it appeared, that previous to *July 1790*, *James Niblock* carried on a separate trade, and contracted separate debts; and that in the month of *July 1790*, he entered into copartnership with one *Richard Cook*, and continued in such copartnership until the month of *April 1791*, having contracted debts in their said copartnership, and amongst others to the petitioners.

In *April 1791*, *Niblock* and *Hunter* became copartners, which partnership was dissolved in *July* of the same year. *Niblock* and *Hunter* were indebted to the petitioners.

On the 30th of *July 1791*, a commission of bankrupt issued against *Niblock* and *Hunter*.

Niblock and *Hunter*, at the time of their bankruptcy, were in possession of stock in trade, part of which was the property of *Nib-*

^r Ex parte Parker, 22d Dec. 1791. Cooke 314.

lock before his having any partnership, part was property acquired during the partnership of *Niblock* and *Cook*, and other part during the partnership with *Niblock* and *Hunter*.

The object of the petition was to arrange the different funds, that is, to allot to the separate creditors of *Niblock*, before his entering into partnership, the property he then possessed; to the creditors of *Niblock* and *Cook*, the property acquired by that firm; and to the creditors of *Niblock* and *Hunter*, their joint fund.

The Lord Chancellor *Thurlow* was of opinion, the only order that could be made, was that for keeping distinct accounts of the joint and separate estates; and said, the creditors of *Niblock* and *Cook* might come as separate creditors under the order.

In bankruptcy, the stat. 5 *Geo. 2. c. 30. s. 28.* directs that, where it shall appear to the commissioners that there has been mutual credit given by the bankrupt, and any other person, or mutual debts between the bankrupt, and any other person, at any time before such person became a bankrupt^s, the com-

^s Buller 181.

missioners,

missioners, or the assignees of the bankrupt's estate, shall state the account between them, and one debt may be set against another; and what shall appear to be due on the balance, and no more, shall be claimed, or paid, on either side. And where there are mutual demands, a defendant upon an action at law may as well set off upon 5 Geo. 2. (the Bankrupt Act) as in common cases, under 2 Geo. 2.

Thus in the case of *Lock v. Bennet* ^t, under the clause in 5 Geo. 2. c. 30. s. 29. viz. "No more shall be claimed and paid than appears to be due on either side, upon a balance of *accounts* stated." Where there were mutual demands between a creditor and a bankrupt, the Master of the Rolls was of opinion, that upon an action at law the defendant might set off his demand against the plaintiff, as is done in other cases by virtue of the statute of 2 Geo. 2. c. 22. s. 13. and 3 Geo. 2. c. 24. s. 6. and that there is no occasion to come into a court of equity, to pray an injunction to a suit at law, and that the plaintiffs at law may account. *Vide Green's Spirit of Bankrupt Laws.*

^t 2 Atk. 49.

Where persons have mutual dealings, signing the account is not necessary to make it a stated one, but it is keeping it any length of time without making an objection, which binds the person to whom it is sent.

Thus in the case of *Willis v. Jernegan*^u.

Lord Chancellor *Hardwicke*. There is no absolute necessity that an account should be signed by the parties who have mutual dealings, to make it a stated account; for even where there are transactions, suppose between a merchant in *England*, and a merchant beyond sea, and an account is transmitted here from the person who is abroad, it is not the signing which will make it a stated account, but the person to whom it is sent keeping it by him any length of time, without making any objection, which shall bind him, and prevent his entering into an open account afterwards.

And an account in partnership trade shall not be inspected after the last balance, as was decided in the case of *Beak v. Beak* *.

Where a balance of accounts was struck between partners, on the dissolution of their part-

^u 2 Atk. 251.

* Rep. in Chas. 190.

nership, it was ruled in the case of *Moravia v. Levi* y, that an action of *assumpsit* would lie for that balance. In that case the plaintiff and defendant had entered into articles of partnership, which contained a covenant to account at certain times; and a demand arose on the balance struck, which it was proved the defendant expressly promised to pay; an objection was taken that the action should have been *covenant*, but it was ruled that the action well lies, as founded on the express promise. And this rule may be said to apply *a fortiori* where the balance was struck on the dissolution of a partnership, and an account stated, containing such balance, together with other articles not connected with it.

Thus in the case of *Foster v. Allanson* z, where two enter into articles of partnership for 7 years, in which is a covenant to account yearly, and to adjust and make a final settlement at the expiration of the partnership, and they dissolve the partnership before the 7 years are expired, and account together, and strike a balance which is in favor of the plaintiff, including several *items* not connected with the partnership, and the defendant promises

y 2 T. R. 438.

z 2 T. R. 479.

to pay it, an action of *assumpsit* lies on such express promise. It is no defence to an action for a debt due, that the plaintiff is a trader, and has committed an act of bankruptcy of which the defendant had notice, no commission having issued nor proceedings had for that purpose: for though voluntary payments under such circumstances are not expected, yet payments enforced by coercion of law are valid against the assignees, in case any commission should afterwards be taken out.

This was an action on an account stated, and other common counts. Plea, the general issue.

On a rule to shew cause why the verdict which had been obtained by the plaintiff in this cause at the last *York Assizes*, before *Perryn B.* should not be set aside, and nonsuit entered; it appeared that in *January 1785*, the plaintiff and defendant had entered into articles of copartnership for seven years, in which there was a covenant to settle yearly at *Christmas*, and to adjust and make a final settlement at the expiration of the partnership, when the stock and profits were to be equally divided, and general releases given.

In

In *April* 1785, the plaintiff committed an act of bankruptcy, which was known to the defendant, but no commission had ever been taken out on it. In *February* 1786, the parties came to an agreement that the defendant should carry on the business alone; and they then came to a settlement of accounts, in which several *items* were included not relating to the partnership account, and the balance being found in favor of the plaintiff for 140*l.* the defendant promised to pay it.

The motion to set aside the verdict was made on two grounds: first, That the action should have been covenant, and not *assumpsit*. Secondly, that the plaintiff having committed an act of bankruptcy which was known to the defendant, the latter was not warranted in paying him the money, as he would be answerable again to the assignees, if at any time a commission should be sued out.

On the day for shewing cause the Court desired to hear *Cockel* Serjeant, and *Holroyd*, in support of the rule.

The proper remedy in this case was by action of covenant; for the parties had covenanted to settle accounts and pay the balance,
and

and the rule is that a plaintiff cannot bring an action of *assumpsit* if he has a remedy of a higher nature. The stating of the account does not change the nature of the debt or of the remedy. In *Drue v. Thorne*, the action was brought against the husband alone on an account stated, and for goods sold; a special verdict was found, stating, that the defendant's wife, when sole, was indebted to the plaintiff for goods, and that after her marriage with the defendant they accounted with the plaintiff, and a balance was found due to him which the defendant promised to pay. There it was held that the subsequent account did not alter the nature of the debt, and as that was originally due from the defendant's wife, judgment was given against the plaintiff because the wife was not joined. In *Herrenden v. Palmer*, administratrix, the declaration was on an account stated between the plaintiff and defendant, on which the latter was found indebted as administratrix, and in her own right. The Court held the action did not lie against the defendant notwithstanding the account stated, because the demand included two rights which could not be joined.

So in *Bull v. Palmer*, where the plaintiff declared in *assumpsit*, setting forth that the

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defend-

defendant had accounted with him, as executor of *J. S.* and on that account had been found in arrear, and had promised to pay him: *non-assumpsit* being pleaded, the plaintiff was nun-suited; and on motion afterwards it was held that he should not pay the costs, for the action was in right of his executorship, and the money, if recovered, would have been assets. Again it was held in *Cowp.* 129, that a promise by a defendant to pay debt and costs in consideration that the plaintiff would stay execution under a judgment recovered is not a sufficient consideration on which to raise an *assumpsit*: it was said by Lord Mansfield, to be turning a judgment debt into a debt upon simple contract. All these cases tend to shew that the stating the account in this case did not supersede the original right of action, but that the covenant was still in force. Then the rule applies that *assumpsit* will not lie where there is a remedy of a higher nature. Besides, if the plaintiff were to recover in this action, and were to sue upon the covenant afterwards, the judgment recovered in this action could not be pleaded in bar, 1 *Burr.* 9. Secondly, the defendant would be answerable to the assignees for this money, in case any commission of bankrupt should hereafter be taken out

out upon the act of bankruptcy committed by the plaintiff, of which the defendant has notice.

It was lately held by the Court in the case of *Vernon v. Hankey*, that after an act of bankruptcy committed, no payment to the bankrupt can be protected, if made by a person having notice of the act of bankruptcy. That doctrine was founded upon the principle, that the bankrupt is not a free agent, and after the act of bankruptcy has not the legal disposition of any part of his property. Then, if the money could not have been paid by the defendant voluntarily, it follows of course, that payment cannot be compelled by any action. For otherwise this strange absurdity and injustice will arise, that although a debtor, who has knowledge of an act of bankruptcy committed by his creditor, is willing to act *bonâ fide*, and to discharge his debt honestly, yet he must necessarily be compelled to bear the expence of an action in order to secure himself, which may be greater than the whole amount of the demand. And even suffering judgment to go by default would not protect him; for if it be a good objection to make, he would be bound to

take it; otherwise the assignees might recover the debt from him a second time.

Aspburst J.—There is no foundation for this application on either of the grounds mentioned by the defendant's counsel. It is first objected to the form of the action, that an account stated will not lie, because part of that account arose on a partnership transaction, and that as to that the plaintiff has a remedy of a higher nature. But by the stating of the account and introducing other articles not relating to the partnership, the nature of the demand is changed, and a new cause of action arose, independant of the articles of covenant. Both parties by agreement consolidated the demand; and the defendant must be taken to have thereby given his consent to consider this as a new debt on an account stated. Besides, it is for the defendant's benefit; and it is extraordinary that he should insist on being harrassed with two actions, when the whole demand may be recovered in one. There appears to be as little weight too in the second objection. It is objected that the plaintiff cannot maintain this action, because he committed an act of bankruptcy so long ago as in the year

1784,

1784, though it was not followed up by a commission, nor by any subsequent steps to obtain one. If this objection were to prevail, it would equally hold at any distance of time, though it were never in the contemplation of any creditor to sue out a commission. But I think that, apart from that consideration, it does not lie in the defendant's mouth to make the objection. Where a person pays voluntarily with notice of the bankruptcy, there the rule holds; but not where he pays by the coercion and judgment of a Court of Law. An act of bankruptcy cannot not over-reach a judgment recovered. If indeed it were by collusion, that might alter the case. But there is no pretence for saying that there is any collusion in the present case.

Buller J.—The first question is, Whether this action can be maintained in its present form. The parties entered into articles of co-partnership, in which there is a covenant to adjust and make a final settlement at the expiration of the term. *Prima facie* therefore the plaintiff was entitled to bring an action on the covenant: if it rested there, the objection must have prevailed. But on the dissolution of the partnership, the parties

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settled

settled an account. And it is to be observed, that the account was not confined to matters relating to the partnership, but it includes other articles for which covenant will not lie. Therefore when the defendant promised to pay the balance, there was an end of the covenant. And even if no other articles had been introduced into the account but those relating to the partnership, I should still be of opinion that *assumpsit* would lie. For the question then would be, Whether a previous partnership being dissolved, and an account settled, is or is not in point of law a sufficient consideration for a promise? I have no difficulty in saying that it is. Now here there was an express promise by the defendant to pay the balance; and therefore the case cited from *Alleyn* does not apply; for in that case there was no express promise. It is objected that the judgment in this action could not be pleaded to an action brought on the covenant: but I think it might, if pleaded with proper averments. For a plaintiff cannot recover a double satisfaction: if he has recovered a judgment in one form of action, he cannot afterwards recover in another for the same cause of action. With respect to the other objection, in support of which the case of *Vernon and Hankey* is cited; there the
payment

payment was made voluntarily with knowledge of an act of bankruptcy, which was followed up by a commission. The assignees can only recover where the payment has been voluntary, and with notice: but in the present case there has been no commission, no docquet was struck; neither was there any intention to sue out a commission; and the defendant will not be considered to have paid this demand voluntarily. If indeed there were any fraud, by the defendant's colluding with the bankrupt in suffering a judgment to be recovered against him, that would be a different case. But there is no fraud in this case; the defendant has no legal defence; and the action is right in point of form.

Grose J. declared himself of the same opinion on both points.

Rule discharged.

By the common law none could be charged in account, but as guardian in socage, bailiff, or receiver, except in favor of merchants, and for the advancement of trade, and by the law of merchants, one naming

himself merchant, might have an account against another naming him merchant, and charge him as his receiver ^a. And altho' actions of account may be brought in some cases by one partner against another, yet still are matters of account thought more properly cognizable in equity than at law, as the party can have a discovery of all books, papers, and writings, together with the benefit and advantage of the defendant's oath. But since the practical arts of merchants and traders are best understood by those who are most skilled in the science of merchants' accounts, perhaps the readiest way to adjust differences between partners is to refer all matters in dispute to persons in their own line to settle accounts between them. And we have the highest authority for adopting this plan, because the House of Lords, in matters of account which are intricate, refer it to two merchants named by the parties, to consider the case, and report their opinions upon it.

Thus in the case of *Gyles v. Wilcox and Others* ^b.

^a 1 Inst. 372. a. 11 Co. 89.

^b 2 Atk. 144.

Lord Chancellor *Hardwicke*—The House of Lords very often, in matters of account which are extremely intricate and perplexed, refer it to two merchants named by the parties, to consider the case, and report their opinions upon it, rather than leave it to a jury.

CHAPTER XII.

As between Partners and Third Persons.

MERCHANTS and traders know of no difference between dealing with an individual or a co-partnership firm, and all partners are bound by what any one of them does in their joint trade or business, for, *quoad hoc*, each partner must be considered as an authorised agent for the rest, both by the common law, and the law-merchant.

Thus where two partners agreed to *borrow* a sum of money of a third person, but only one gave a bond, and the other witnessed it, the money was afterwards entered in the cash-book of the partnership; upon a bankruptcy happening, a joint commission was taken out, and the obligee named in such bond was considered entitled to come in and prove his debt under the joint commission ^a.

So likewise it hath been ruled that if two partners agree to *pay* a sum of money to a third person, tho' out of their own private cash,

^a 1 Atk. 225.

they

they must be jointly sued. Thus it was held in the case of *Byers v. Dobey*, where there was a contract made by two partners to pay a certain sum of money to a third person *equally* out of *their own private cash*.

This was an action in *assumpsit*^b for the use and occupation of a shop, counting-house, and chambers, part of a messuage, with the appurtenances, &c. *quantum meruit*, money paid, laid out, and expended, money lent and advanced, money had and received, damages 200*l*.

Plea in abatement, "That the promises, &c. if any, were made by the defendant and one *George Bethell* jointly, and not by the defendant only, &c."

Replication, That they were made by the defendant only, and not by him and the said *George* jointly, &c. On which issue was joined, and a verdict found for the defendant. The material facts of the case were these: By articles of partnership entered into in 1774, between *David Humphries* of the one part, and *Richard Byers* (husband of the plaintiff) *John Dobey* (the defendant), and

^b H. Blackst. Rep. 236.

George Bethell of the other part; it was agreed, amongst other things, that *Byers*, *Dobey*, and *Bethell*, should carry on in partnership the trade of a hosier for 14 years, and purchase the stock in trade, utensils, and fixtures of *Humphries*: that *Humphries* should grant to *Byers* a lease of the house, &c. where the business was carried on for twenty-one years, at the rent of 50*l.* clear of all taxes, payable quarterly, by and out of the *private cash* of *Byers*; in which lease, a room should be reserved for the use of *Humphries*, during his life, and after his death for the use of *Byers*; that the business should be carried on by *Byers*, *Dobey*, and *Bethell*, in the shop and other parts of the house as it had before been done by *Humphries*; that *Byers* and his family should live in the house; that *Byers* should during the partnership, as a compensation for the use of the shop and premises, *be paid equally by Dobey and Bethell out of their own private cash* 25*l.* yearly, by quarterly payments, and that they should pay *Byers a moiety of all taxes whatsoever*, for, or on account of, such house and premises: that if either of the partners should die and leave a widow, *she should, if she chose, be taken into the partnership* for the remainder of the term: that if *Byers* should leave a widow,

widow, and she should continue in the business with the surviving partners, *then she should hold the said house upon the same terms and conditions* as he would have holden it, if he had been living, &c.

Byers died in 1778; his widow, the plaintiff, continued in the partnership with the defendant and *Bethell*, till the expiration of it, when she brought this action to recover 12 *l.* 10 *s.* half the annual rent of 25 *l.* (for the use of the house, &c. which was to be paid equally out of the private cash of the defendant and *Bethell*, according to the articles), together with the rent for part of a year preceding the expiration of the partnership, and half of one moiety of the taxes, as the defendant's share under the articles.

A rule having been granted to shew cause why the verdict should not be set aside, and a new trial granted;

Bond Serj. shewed cause, and contended that the words "*to be paid equally*," made *Dobey* and *Bethell* joint tenants, and not tenants in common. This construction would be put on the like words in a deed; and if words of grant be thus constructed, so also
ought

ought words of render. Although in wills and deeds of conveyance under the statute of uses these words would make a tenancy in common, yet in deeds at common law they make a jointenancy. 1 *Salk.* 390. *Ward v. Everard.*

Watson Serj. for the plaintiff argued that as the money was agreed to be paid “out of the private cash” of *Dobey* and *Bethell*, it was to be paid by them separately, and not out of the joint stock. There could be no joint private cash: the expression, to be paid equally, could only mean that each should pay a moiety of 25 *l.* and the words *private cash*, shew that they were individually answerable.

Lord *Loughborough*. If one of them had died, would *Byers* have been entitled only to 12 *l.* 10 *s.*? The interest in the trade would have survived, yet according to the argument of the plaintiff, though that interest would have survived to the partnership, *Byers* would have been reduced to 12 *l.* 10 *s.* It was in its nature a joint undertaking.

Gould and *Heath* J. of the same opinion.

Wilson

Wilson J.—The words *private cash*, could only mean that the rent should not be paid out of the partnership stock, but the contract was joint between *Dobey* and *Bethell*, as relating to a third person.

Rule discharged.

In a firm or company where the partners are jointly concerned in any trade or business, the books are kept in the name of the whole, and the stock being joint, it is understood by merchants that there can be no other method of stating any occurrence, that can happen in trade between the partnership and third persons, otherwise than if carried on by a single person, the company being relatively so considered by assuming a title which includes the whole; therefore the mode of traffic must in all respects be considered the same between partners and third persons, as with an individual merchant and the world. And in all legal proceedings by or against partners respecting any joint contract or undertaking with third persons, it is necessary that the partners should be joined, otherwise advantage may be taken of the omission.

Thus it was ruled in the case of *Leglise v. Champante* ^c. Where there is a partnership

c 2 Stra. 820.

demand,

demand, *all the partners should join in the action*, for the contract and undertaking is joint; and if in such case one partner only brings the action, the defendant may take advantage of it at the trial, and nonsuit the plaintiff; for the contract is not the same: but in the case of a tort, this must be pleaded in abatement.

Therefore, in the case of *Graham v. Robinson*^d, where the plaintiffs were partners with two other persons of the name of *Grant*; and they were joint owners of a privateer which cruised in company with the defendants, under an agreement to share the prizes equally. They took a prize in the *Mediterranean*, which was condemned at *Minorca*, and divided the money arising from the sale: the sentence there was afterwards reversed here, and restitution ordered: upon which the *plaintiffs alone* paid the whole money, (their partners having become bankrupts) and now sued the defendants for the moiety, and they were nonsuited; for if the money was partnership property, the action should have been *in the name of all the partners*; if it was their own, *each* should have had his own action.

Yet, it is held that after a *severance* one alone may sue. As in the case of *Garret v.*

^d 2 Term Rep. 282.

Taylor e, where three had employed the defendant to sell some timber for them, in which they were jointly concerned; two of them he had paid their exact proportion, and they had given him a receipt in full of all demands; *the third now brought his action for the remainder, being his share*; and it was objected, that as this was a joint employment by three, one alone could not bring his action: but it was ruled by Lord Mansfield, That *where there had been a severance*, as above stated, that one alone might sue.

So it was held in *Kirkman v. Newstead* f, where the action was for the use and occupation of a house, it appeared that the house was the property of six several tenants in common; to all of whom, except the plaintiff, the defendant had paid his rent: and this action was for his share of the whole rent. It was objected that one tenant in common alone could not bring this action, but that all ought to join: but Lord Mansfield overruled the objection, and the plaintiff recovered.

Upon an *indebitatus assumpsit* against several, a joint debt on contract must be prov-

e Sitt. G. Hall, Trin. 4 G. 3. MSS. Esp. 117.

f Sitt. Westm. M. 1776. MSS. Esp. 117.

ed g; for it is different in contracts from what it is in torts, which are several, and in which one alone may be found guilty.

And there must be either an express or implied promise to found this action upon h.

Note i, That a promise before it is broken may be discharged by parol agreement: but after it is broken it cannot be discharged without deed by any new agreement, without satisfaction.

So^k he may give in evidence on the general issue, that the plaintiff has a partner, for then it would not be the same contract. For the gist of the action is the fraud and delusion that the defendant has offered the plaintiff in not performing his promise, and therefore whatever goes to shew there was no contract, or that it was performed and released, or that there was no consideration, goes to the gist of the action, because there could be no delusion or fraud to the plaintiff at the time of the action brought.

g Buller's N. P. 129.

h Ibid.

i 2 Lev. 144. Ca. K. B. 538. 1 Mod. 259.

k Buller N. P. 152.

So he may give in evidence that the promise was made by him and another jointly¹; though in regard to this there has been some latitude of late in the conduct of most Judges, who will not nonsuit a plaintiff on such evidence, unless it appear clearly that the plaintiff knew there were more partners than he has brought his action against, for he gave credit only to such, and therefore the law may well raise an *assumpsit* in them only.

And in a late case, where two persons were partners, and the plaintiff dealt with them as such, and intitled his account "*Cole and Shute*," but brought his action against one only, and was nonsuited at the Assizes; the Court set aside the nonsuit, and granted a new trial. *Rice v. Shute* ^m.

This was an action brought *against one partner only*, upon a *partnership account*.

At the trial, (which was before Mr. Justice Bathurst) the defendant gave evidence that there was *another partner* (named *Cole*) who was *not joined* in the action, as a defendant;

¹ Segar and Randal, Mic. 24 Car. 2.

^m Bur. 2611. 2 Black. Rep. 695. S. C.

which he ought to have been, as the plaintiff knew the fact to be so. Whereupon the plaintiff was nonsuited.

Mr. Serj. *Burland* moved (upon the 5th of this instant *May* 1770), on behalf of the plaintiff, to set aside this nonsuit, and to have a new trial.

It appeared upon the Judge's report, that the plaintiff could not but *know* of the partnership; for that all the letters shewed, and it was even stated upon the very account itself, "that *Cole* and *Skute* were partners." So that the plaintiff was *not surprized* by the defendant producing this *evidence* of a partnership: on the contrary, he had brought his action in this manner against the present defendant alone, with a deliberate design to take some advantage of him.

The Serjeant's objection was, that this matter could *not* be *given in evidence*, but ought to have been *pleaded in abatement*.

The Court gave him a rule to shew why the nonsuit should not be set aside, and a new trial had.

Mr.

Mr. Serj. *Davy* now (on this 14th day of *May*) shewed cause.

He said, it would be very mischievous, if a person having a demand upon a partnership should be at liberty to cull out one particular partner, and bring an action against him alone, leaving out the rest of the partners.

In the case of *Boson v. Sanford*, 2 *Salk.* 440. the Court held "That *all* the part-owners of the ship must be joined:" and they gave judgment for the defendant, *because* all the owners were *not* joined.

This *may* undoubtedly be *pleaded in abatement*, but it is not necessary that in *all* cases whatsoever it *must* be pleaded in abatement: in some cases, and under certain circumstances, and partly where it is within the plaintiff's *own knowledge* "that there are more partners," it may be *given in evidence*, without pleading it in abatement.

Here, the plaintiff *knew* that *Cole* was partner with the defendant. He was not surprized by this evidence: he acted with his eyes open, and with a deliberate design to take an unfair advantage.

If the defendant had pleaded in abatement, he must have *shown* who his partners were; and then the plaintiff, being *thus informed* who they were, must have brought a *new* action against them all. But in the present case, the plaintiff *already knew*, of his own previous knowledge, “who were the partners:” and therefore he was as much obliged to bring his action *originally* against them all, if he had come at that knowledge only by the defendant’s plea in abatement. As soon as he knows who the partners are, he is obliged to bring his action against them all; however he may come at this knowledge, he cannot, after having obtained this knowledge, select one, and omit the rest. Its being pleadable in abatement shews that he cannot omit any one, if in fact there are more than one; and if he does know it before he brings his action, it is more expeditious and more reasonable, that he should join them all at first. And though it may have been heretofore holden “that it could not be given in evidence,” yet that was only an opinion at *Nisi Prius*: there never has been any such determination of this Court, or any where else in your Lordship’s time. And if it has been ever holden “that it was sufficient to make the *acting* partners defendants,” the rule has been since established,

blished, “that *all* must be joined, if known.” He therefore prayed that the nonsuit might be recorded.

Serjeant *Barland* was proceeding to support his rule, but was stopped by Lord *Mansfield*, as not being necessary.

Lord *Mansfield*.—To be sure, a distinction is to be found in the books between *torts* and *assumpsits*: “That in *torts*, all the trespassers “need not be made parties: but in actions “upon *contract*, every partner must be made “a defendant.” Many nonsuits, much vexation, and great hindrance to justice, have been occasioned by this distinction. It must have been introduced originally from the resemblance of convenience, that there might be one judgment against all who were liable to the plaintiff’s demand. But experience shews that convenience, as well as justice, lies the other way. All contracts with partners are *joint and several*: every partner is liable to pay the *whole*; in what proportion the others should *contribute*, is a matter merely among themselves. A creditor knows with whom he dealt, but he does not know the secret partner. He may be nonsuited twenty times before he learns them all; or driven

into a suit in equity, for a discovery “who they are.” It is cruel to turn a creditor round, and make him pay the whole costs of a nonsuit, in favour of a defendant who is certainly liable to pay his whole demand; and who is not injured by another partner’s not being made defendant, because, what he pays, he must have credit for, in his account with the partnership. Upon this point, I very early consulted the three other Judges of this Court, Mr. Justice *Denison*, Mr. Justice *Foster*, and Mr. Justice *Wilmot*. They were all of opinion, “that the defendant ought to *plead it in abatement*; he then must say, *who the partners are*.” If the defendant does not take advantage of it at the beginning of the suit, and plead it in abatement, it is a *waver* of the objection. He ought not to be permitted to lie by, and put the defendant to the delay and expence of a trial, and then set up a plea not founded in the *merits of the cause*, but on the *form of proceeding*. The old cases make no distinction between the plaintiff’s *knowing* of a partnership, or not. Here, indeed, the plaintiff knew of it; but the present defendant was the person with whom he transacted. He must be allowed this, in his account with the other partners. No injustice is done to the defendant by allowing the plain-
tiff

tiff to recover, but great injustice is done to the plaintiff by allowing the nonsuit to stand; and what is still worse, a mode of litigation allowed which is highly inconvenient.

Mr. Justice *Aston* concurred. He said, that his Lordship had gone through the whole; he would not repeat what had been already mentioned, but he observed that there was no necessity for admitting it to be given in evidence, nor any inconvenience in pleading it in abatement; and the not pleading it in abatement seemed to be a waver of the objection.

The case in which Mr. Justice *Vates* tried the cause, was a contract about wood, but it was never decided here by the Court.

He took notice that upon a *joint bond* the action cannot be brought against one of the obligors *only*. This was the point of a case in *Michaelmas* Term 1750. 24 G. 2. in this Court, which was argued by the late Lord *Lifford*: the name of it was *Homer v. Moore*. [I have a note of this case.] *Non est factum* was pleaded, and the jury found it to be the deed of *both*.

Mr.

Mr. Serjeant *Hewitt* moved in arrest of judgment, upon the face of the declaration. He acknowledged that it could not have been moved in arrest of judgment, if it had not appeared upon the face of the declaration; but it there appeared that both had sealed the obligation, and both were living. He owned that if it had not appeared upon the face of the declaration, it must have been averred. Mr. *Ford*, who was for the plaintiff, gave it up, and the judgment was arrested.

Mr. Justice *Willes* and Mr. Justice *Blackstone* being both of the same opinion,

The whole Court were unanimous that the nonsuit ought to be set aside, and a new trial had.

Rule made absolute.

Where an action is brought against two joint debtors, and one only appears, the creditor may have judgment for his whole debt against the person appearing, and by default, against the person who does not appearⁿ.

If an action is brought against one partner only, no advantage can be taken of the omission, but by plea in abatement.

Thus in *Abbott v. Smith*^o. which was a case on *indebitatus assumpsit*. On general issue pleaded, verdict for the plaintiff. It appeared on the trial, that the defendant *Smith* and one *Robinson* were merchants in partnership, and that partnership notorious. That the dealing upon which the present action was founded was transacted between *Abbott* and *Robinson* only, but upon the partnership account, and that at the time of bringing the action, the partnership was dissolved.

Glynn, supported by *Walker*, moved for a new trial last *Michaelmas* term, because it appeared upon evidence, that the action was misconceived, and ought to have been brought against both the partners; wherefore he insisted, that the Judge who tried the cause, (Mr. Justice *Nares*), ought to have nonsuited the plaintiff.

No cause was shewn last term on account of the indisposition of the Chief Justice, and

this being a matter of extensive precedent, it was wished to be determined in a full Court.

And now, *Davy* for the plaintiff shewed for cause, that it had been already determined in the case of *Rice* and *Shute* in the *King's Bench*, *Pasch.* 10 *Geo.* 3. That where a man deals with two or more partners he may bring his action against any of them at his option, and his leaving out the others is only pleadable in abatement. And this case is stronger than that, for here the credit is proved to have been given to the *partnership account*. And therefore as the undertakings of the partners are several as well joint, they are severally liable to an action. 'Tis true there is an old case where the contrary doctrine is laid down, that of *Boson* and *Sanford*, *Salk.* 440. 3 *Mod.* 321. *Shower* 29. 101. 3 *Lev.* 258. *Carth.* 58. There it was argued, that because all the owners of a vessel must join as plaintiffs in an action against a stranger, therefore a stranger must join them all when he brings an action against any of them. But this is a strange *non sequitur*. The owners themselves know who is owner and who not: a stranger may not have knowledge,

knowledge. And the authority of this case has been shaken by many determinations at *Nisi Prius*, and this of *Rice* and *Shute* by the Court. It is fit that the defendant shall be driven to his plea in abatement, if it were only for this reason, that in a plea in abatement the defendant must name all the partners, so the plaintiff cannot mistake a second time. But when given in evidence on the general issue, the defendant may shew at first *one* other partner, the next time *two*, and so on, to his endless vexation.

Glyn and *Walker*, in support of the rule, contended, that this case was distinguishable from that of *Rice* and *Shute*, because there the action was brought against the *acting* partner, whereas here the dealing was with *Robinson*, and not with the defendant *Smith*. You must admit notice of the partnership, before you can bring action against a non-acting partner. That all contracts by partners are *primâ facie* joint, and require special circumstances to make them several. It never was the opinion of the Judges in *Boson* and *Sandford* that invisible partners might start up from time to time and perplex the cause: Their idea extends only to
known

known and visible partners, as in the present case.

In *Lloyd and Green*, at *Shrewsbury* Assizes, the 4th of *April* 1767, the case was, that *Lloyd* sold some wood to one *Wilkinson*, who absconded: and *Lloyd* afterwards discovering that *Green* was a partner with *Wilkinson*, brought an action against *Green*.

Jates Justice, held that an action might lie against *Wilkinson* only, or against *Green* and *Wilkinson*, but not against *Green* alone, and that the plaintiff ought to be nonsuit: but however made a case of it: which not being set down in time was never argued. As to pleading this in abatement, it is impossible. It is a plea in chief: it denies the whole declaration, it sets up a joint contract, where the plaintiff declares on a several one: and therefore amounts to the general issue. And no instance of it can be found in the books. It would produce more fraud and confusion, than it can be supposed to remedy.

Afterwards in the same term, *De Grey* Chief Justice delivered the opinion of the Court.

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There are two considerations necessary for the Court to decide upon in this case. 1. The nature of the contract. 2. The manner of the suit. The last is consequential upon the former. The contract when made with partners, is originally a joint contract, but may be separate as to its effects. Though all are sued jointly, and a joint execution taken out, yet it may be executed against *one* only. Each is answerable for the whole, and not merely for his proportionable part. Equity must be called in to make the rest contribute. A creditor, being party to the contract, is bound both by law and conscience, to do all that is necessary to effectuate the contract. He may sue one of his debtors only: but if the defendant calls on him to make all the rest defendants, he shall be obliged to do it. It is just that it should be so. 1. That all may assist in the defence. 2. That all may enter into a rateable contribution to pay what shall be recovered. 3d. To take away all colour and pretence of collusion. Where the suit is only brought against one, the law perhaps cannot do complete justice in the same suit. I know of no writ of contribution. But in another suit, for money laid out for the other's use, contribution may in effect be obtained. A Court of
Equity

Equity does complete justice at once, by calling all parties before the Court. So at law, if the defendant means to take advantage of the partnership, it ought to be pleaded in abatement: else it is supposed to be waived. As it is for the benefit of the defendant, he ought to claim it in the earliest stage, and not put the plaintiff to the trouble of making out his case, and then bring this objection after. In *Bosen and Sandford* all the Judges agreed, that if the matter could be pleaded in abatement, it ought not to be given in evidence: and *Dolben* Justice held that it might be so pleaded.

Holt and the other two Judges doubted, because it was said to amount to the general issue by denying the point of the action. But surely, saying that another person contracted at the same time that I did, is not saying that I did not contract. In the case of joint bonds this doctrine is strongly supported, *Whelpdale's case*, 5 Co. 119. *Stead and Mobun*, Cro. Jac. 152. If *non est factum* is pleaded to an action brought against one obligor, proof of a joint obligor does not vitiate the action.

So in *Chapple and Vaughan*, 1 Saund. 291. 2 Keb. 525. reported also 1 Tentr. 34. 1 Siderf.

derf. 420. and *Ascue and Hollingworth, Cro. Eliz.* 494. and *Sayer and Chaytor, 1 Lutw.* 695. is exprefs that fuch objection is not pleadable in bar, but in abatement. It is true thofe were fpecialties, and this a fimple contract. But the reafon is analogous in both. Proof that another alfo contracted, does not prove that I did not contract. Nor is this novel doctrine, without any inftance (as was faid) to be found in the books. It is as old as the Year-Book. *Mich.* 35 *Hen.* 6. 38. If one brings debt againft another, and declares for the price of a horfe, it is a good plea in *abatement* to fay, that the defendant and another bought the faid horfe. S. C. cited *Bro. t. Briefe* 37. So *Tr.* 9 *Ed.* 4. 24. *b.* Writ of debt brought againft *B.* and plaintiff declares on a contract: the defendant fays that the contract was made by him and one *C.* ftill living and not named in the writ: upon which the writ abated. Afterwards *C.* dies, and a new writ is brought againft *B.* upon the fame contract, he fhall be received to wage his law (which fhews it to have been a fimple contract) although he hath before acknowledged the contract, for he may have fince difcharged it. And again, *Pafch.* 10 *Ed.* 4. 5. In writ of *account* againft me as receiver, it is a good plea that I and another

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were the receivers, who is still living: Judgment of the writ. For thereby I shall compel the plaintiff to charge another as well as me; and besides he may have some matter of discharge of which I have no knowledge. If this be, as it is, sound law; it is also better upon the score of convenience that it should be so established, as has been already done in *Rice* and *Shute* in the King's Bench.

The case of *Lloyd* and *Green* was never determined as stated, it was only the first thoughts of a single, though very respectable Judge on the circuit; and he left it to the judgment of the Court as a dubious point.

In *Bosen* and *Sanford* the Court was divided; and the three who determined the case went upon a false assumption, that this could not be pleaded in abatement. Had they been aware that it could, they declared that it could not have been given in evidence.

The convenience I hinted at is this: that by forcing the defendant to plead this in abatement, or wave it entirely, he cannot turn the plaintiff round more than once, by setting up fresh partners upon every fresh action. He is to plead the whole truth of
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the case, and give the plaintiff a better writ.

If *A.* pleads a partnership between himself and *B.* and after issue joined, a partnership is proved between *A.* *B.* and *C.* this would be conclusive against the defendant. As for collusion in omitting a known partner, that to be sure is possible, but it follows from the nature of a joint trust, and is not the necessary consequence of the doctrine. Greater inconveniences will follow from rejecting it, than can from adopting it.

Rule for a new trial discharged.

Per tot. Cur.

CHAPTER XIII.

Liability of each to Creditors.

WHERE one partner is out of the kingdom, the partner before the Court shall pay the whole of a joint demand.

In the case of *Darwent v. Wilson*, the question was, if a bill be brought against one partner for a joint demand, and the other is not amenable to the Court, being out of the kingdom; whether the partner before the Court shall pay the whole, or one moiety of the debt?

Lord Chancellor *Hardwicke*. — “ Upon considering this case, I am of opinion, that the partner before the Court ought to pay the whole. This is analogous to the proceedings in courts of law, and likewise in this Court; for where a defendant is out of the reach of the Court, and cannot be made to appear, it amounts to the same thing as if the plaintiff had taken out process for want of an appearance, and carried it through the whole line of process to a sequestration.

In this case, it is in vain to take out process, because the joint debtor is out of the kingdom. An exception for want of parties, here, is in the same nature with a plea in abatement at law; but if you go upon the merits there, you can never take it up again: now in equity, you may take exceptions at the hearing of the cause, or you may demur for want of parties.

In the first place, What is the method of proceeding at law, in case of a joint demand, if one of the creditors will not join in the action? He is summoned and severed: if he will not proceed jointly after summons and severance, then the other creditor has judgment *quod sequatur solum*.

On the other hand, if there are two joint-debtors, the creditor must bring his action against both; but if one only appears, and the creditor carries it on through the whole line of process to an outlawry against the person not appearing, then he may proceed solely against the other, and shall have judgment for his whole debt against the person appearing, and judgment only by default against the person who does not appear, which is all that he can do with regard to the latter; for as to his

goods, they are forfeited to the Crown upon the outlawry.

The proceedings upon the act for making process in courts of equity effectual against persons who refuse to appear, 5 Geo. 2. c. 25. s. 1. are as follows: “ Upon the defendant’s
 “ not appearing, the Court may order the bill
 “ to be taken *pro confesso*, and make such de-
 “ cree as shall be thought just; and may
 “ thereupon issue process to compel the per-
 “ formance by an immediate sequestration,
 “ or by causing the possession of the estate or
 “ effects demanded by the bill, to be deliver-
 “ ed to the plaintiff, or otherwise, as the na-
 “ ture of the case shall require.”

Before the act, you might carry it on through the whole line of process against a defendant, who did not appear to the sequestration, and no further; you might notwithstanding set down the cause against the other defendant, and have a decree for the whole. If you could do this before the act of parliament, where a person was in the kingdom, but obstinately refused to appear, much more ought the Court to make a decree against one partner, where the other is out of the kingdom, that an account should be taken, and that

that the whole which appears to be due to the plaintiff should be paid by the defendant, the partner who is brought to a hearing; and his Lordship ordered accordingly.

The discharge of a bankrupt by virtue of 4 & 5 Ann. c. 17. shall not discharge his partner in trade at the time he became bankrupt, but such partner must still remain liable; which was also confirmed by a subsequent act^a, in the words following, *viz.* “ And
 “ whereas a doubt has arisen upon an act
 “ made in the fourth year of her Majesty’s
 “ reign, intituled, *An act to prevent frauds frequently committed by bankrupts*, whether the
 “ discharge of a bankrupt, by virtue of that
 “ act, should be construed to discharge the
 “ partners of such bankrupt, from the same
 “ debt; be it therefore further enacted and
 “ declared by the authority aforesaid, that by
 “ the discharge of any bankrupt or bankrupts,
 “ by force of the said act, or any other acts
 “ relating to bankrupts, from the debts by
 “ him, her, or them due and owing, at the
 “ time that he, she, or they did become a
 “ bankrupt, shall not be construed, nor was
 “ meant or intended to release or discharge
 “ any other person or persons, who was or

^a 10 Ann. c. 15. s. 3.

“ were partner or partners with the said
“ bankrupt in trade, at the time he, she, or
“ they became a bankrupt, or then stood
“ jointly bound, or had made any joint con-
“ tract together with such bankrupt or bank-
“ rupts, from the same debt or debts, from
“ which he was discharged, as aforesaid, but
“ that notwithstanding such discharge, such
“ partner and partners, joint obligor and
“ obligors, and joint contractors with such
“ bankrupt and bankrupts, as aforesaid, shall
“ be and stand chargeable with, and liable to
“ pay such debt and debts, and to perform
“ such contracts, as if the said bankrupt and
“ bankrupts had never been discharged from
“ the same.”

And partners may be considered liable to the fullest extent in all cases where a commission of bankrupt is awarded and issued against the copartnership firm.

There is also a rule laid down with respect to creditors, as to the making of their election, in cases where partners are jointly and severally bound, which makes them individually liable; for it is decided that a bond creditor to whom the partners were jointly and severally bound, may make his election to

to come against the joint, or separate estate, but not against both, except for the deficiency, and after the other creditors are paid. Thus in *ex parte Banks* ^b,

Where a joint commission only was taken out against two partners; the petitioner a bond-creditor to whom the bankrupts were jointly and severally bound. It was held, in such case he may make his election to come upon the joint, or separate estate: if upon the former, he cannot come upon the latter (and so *vice versa*) for the surplus of the debt, till the creditors of the separate estate are first served. And Lord Chancellor *Hardwicke* founded his order upon this reasoning, because the bond-creditors might have brought a separate action at law against each of them, and might have had likewise separate executions, but could not have levied his debt upon both the estates at the same time, but only for the deficiency, where one estate was not sufficient to satisfy the whole.

And in the case of *Lord Craven v. Widows* ^c, two partners in trade put in each an equal stock, and agreed by covenant, that the

^b 1 Atk. 107.

^c 2 Chan. Cas. 139.

stock should pay the debts of the stock, and neither of their separate debts should charge the stock, but only his own estate, or to that effect. They both became bankrupts, and a commission issued against them both. One of them owed separately more than the other. The question was between the separate creditors of each bankrupt, and the creditors on account of the joint stock; for these would exclude the separate creditors from charging the joint stock, but that it should satisfy the stock debts. But the Lord Keeper *North* was of a contrary opinion; for the covenant of the partners cannot bind any of their creditors, but only themselves.

Although it is a settled rule, That, if one partner is an executor or trustee, and *with* the knowledge of his copartner lends the trust fund to the trade, it becomes a debt which may be proved against the joint estate. Yet, if one partner brings trust money into a trade, *without* the knowledge of his co-partner, it is a breach of trust in him, but cannot be proved as a joint debt.

Therefore on a petition *ex parte Apsey*^d, where it appeared that on the 11th of Febru-

^d 3 Brown 265.

ary 1790, a commission of bankrupt issued against *William Tory*, and the petitioner and *Edward Allen* were chosen assignees; and in April 1791, a joint-commission of bankrupt issued against *James Allen* and *Edward Allen*, under which *Lester* and *Hyde* were appointed assignees. *Edward Allen*, before the latter commission, and as one of the assignees of *Tory*, received several sums of money, part of his estate, and paid several sums on the account; and at the time of the bankruptcy, *Edward Allen* was indebted to the estate of *Tory* 432 *l.* 17 *s.* 6 *d.* which he had paid and applied in discharge of debt, due from him, and *James Allen*, and otherwise in the joint trade. The petitioner applied to the commissioners to permit him to prove this sum of 432 *l.* 17 *s.* 6 *d.* under the joint commission against the partnership; and the same being refused, presented this petition to the Lord Chancellor, praying to be at liberty so to do.

The Lord Chancellor said, in the case *ex parte Clowes* ^e, the partners had agreed to consolidate the separate debts, which made the difference. Here one by abusing his trust, advances the money to the partnership, that

will not raise a contract between the partnership, and the person whose money it is. And dismissed the petition.

If *A.* and *B.* partners in a general trade, are bound in a bond to *J. S.* and *A.* and *B.* break off the partnership, and divide their stock; *J. S.* the obligee in the bond knowing this, and that *A.* took upon him to pay the debts; and after a great distance of time brings a bill against the executors of *B.* yet he (*J. S.*) shall recover .

Thus *A.* and *B.* partners in a goldsmith's trade, in 1693 were bound in a bond to *J. S.* for the payment of 1000 *l.* and interest; which 1000 *l.* was *that* year employed in the partnership trade; and in the *same* year they dissolved the partnership, when *A.* by ready money and his own bond secured to *B.* his share of the partnership stock, and took on himself all the partnership debts, *covenanting* to secure *B.* from such debts. *Public notice* was given to all the creditors of the joint stock, that they were either to receive their money, or look on *A.* only as their pay-master. *B.* died, leaving *C.* his executor, and *D.* his residuary

† *Heath v. Percival*, 1 *Str.* 403. 2 *Eq. Ca. Ab.* 167. pl. 14. 630. pl. 2. 1 *P. Wms.* 683.

legatee. J. S. in 1708 called in his money from A. but then continued it upon A.'s subscribing the bond at 6 *l. per cent.* A. continued solvent till 1711, and J. S. might, till that time, when he pleased, have had his money. J. S. outlawed B.'s executor^g, and brought this bill against D. B.'s residuary legatee, to recover the 1000 *l.* and interest out of the assets of B. A. having in 1711 become a bankrupt, and insolvent, Lord Chancellor *Parker*, the defendant's testator, being bound in a bond, he must lie at stake until the bond be paid; and though J. S. continued the money on the bond, this was not material, since it was upon the credit of both the obligors. As to the notice given by A. to the joint creditors to bring in their securities, and that A. alone would be thereafter liable, that being *res inter alios acta*, could not bind J. S. and his changing the interest did not alter the security, for still it was the bond of both, but that the defendant could not be liable to more than 5 *l. per cent.* for the arrear of interest; wherefore J. S. had a decree for his debt, interest and costs.

g The executor (in trust) being *outlawed*, and a witness proving that he had enquired after, but could not find him, this was thought to be a full answer to the objection that such executor was not made a party. *Ibid.*

Copartners having a joint trade, and one of them accept a bill of exchange, if he does not pay it, an action lies against the other, 1 *Ld. Raym.* 175. *Pinkney v. Hall.*

That if two merchants are *partners* jointly merchandizing together, and the one of them subscribes a bill for the payment of money by him and his *partner* mentioned therein, to another or his order, that then both the partners are bound by the subscription of that single person; and that if the person, to whom this bill is payable, indorses it payable to any other person, that then those partners ought to pay such bill upon notice, to him to whom it is made payable. In this case^h, *J. S.* and defendant *Hall* were *partners*; and *J. S.* subscribed a bill of 100*l.* payable to *Hutchins* or his order, by himself and his *partner*. *Hutchins* indorsed the bill to the *plaintiff*, of which defendant had notice, but upon demand did not pay.

Verdict for plaintiff.

So also, if a bill is drawn by two, payable to us, “*or our order*,” and subscribed by both, though not in partnership, they make them-

^h 1 *Salk.* 126. *S. C.* 5 *Mod.* 398. *S. P.* 6 *Mod.* 36. *S. P.* 2 *Salk.* 442. *S. P.*

selves

selves partners by the form of the bill, to the effect of making an indorsement by one of them valid.

Thus in the case of *Carick v. Vickery*ⁱ.

This was an action by the indorsee of a bill of exchange, which was in the following form :

“ Mr. *Abraham Vickery*,

Two months after date, please to pay to us or our order the sum of, &c.

John Maydwell.

John Maydwell.”

It was indorsed thus :

“ *Jon. Maydwell.*

Holloway.”

The *Maydwells* were father and son. The indorsement was by the son. They were admitted not to be partners. The bill, when due, was presented to the defendant, and accepted ; and, at the time of the acceptance,

ⁱ Dougl. 653. n.

he wrote upon it a direction to his banker to pay it. The cause was tried, at the Sittings after *M. 23 Geo. 3.* at *Guildhall*, before Lord *Mansfield*, who nonsuited the plaintiff, because there was not an indorsement by both the parties to whose order the bill was made payable. In *H. 23 Geo. 3.* *Howorth* obtained a rule to shew cause why there should not be a new trial; and the case was argued on *Saturday* the 1st of *February* 1783, by *Wallace* and *Law*, for the defendant, and *Howorth* and *Wood*, for the plaintiff. In support of the nonsuit, it was insisted, that it was clear, when two or more persons are the payees of a bill of exchange, (which in this case the drawers were) and there is no partnership between them, the indorsement of one will not bind the rest, nor make the bill negotiable. The only reason for the names of both the father and the son appearing to this bill, must have been, to prevent its being paid without the joint order of both. Even if the indorsement had been specially by the one, to pay for himself and the other, yet, without evidence of a partnership, the other would not have been bound. The first promise of the acceptor was to pay to the order of two, and a new promise to pay to the order of one could not be raised, without a consideration.

It

It would be a *nudum pactum*. Indeed, where there is a partnership, the acceptance of one partner does not bind the others, unless the bill concerned the partnership trade.

This was determined in the case of *Pinkney v. Hall* ^k. The same thing must hold as to indorsements. If there is no case exactly on the subject, it is because the matter has never been doubted. *Whitcomb v. Whiting*^l may be cited on the other side; but it is not *ad idem*. The statute relative to promissory notes only enables such servant or agent as is usually entrusted by the principal, to bind him by his signature. A partner's signature binds the partnership upon that ground; for every partner may be considered as an agent for the rest of the partnership.

On the other side it was argued, that two persons, by joining in the same bill, hold themselves out to the world as partners, and therefore, for that purpose, are to be treated and dealt with as such. It appears by the evidence, that the acceptance and order to the banker were after the indorsement; that order, therefore, amounted to a recognition

^k 1 Ld. Raym. 175.

^l Dougl. 651.

of the power of the one to bind the other. Besides, the son had the custody of the bill, which implied an authority from the father to negotiate it. They cited *Whitcomb v. Whiting*.

Lord *Mansfield*—I have looked into that case, and do not think it *ad idem*. The general question is of great importance, *viz.* Whether an undertaking, by a bill of exchange, to pay *A.* and *B.* is an undertaking to pay *A.* or *B.*? We will, therefore, take some time to consider of it. As to the order to the banker, it seems to me nothing more than a direction to pay to persons properly authorised.

Willes Justice—I incline to think the order to the banker a recognition of the indorsement.

Ashburst Justice—I do not think the order acknowledges the authority of the indorsement. If the banker had afterwards discovered that the indorsement was forged, he might have refused payment. (*Wallace* had mentioned a case from *Bristol*, of a draft on Messrs. *Hoares*, accepted by Messrs. *Childs*, where that happened.)

Buller Justice—I think the order to the banker makes no difference. But it seems to me, that, when a bill goes out into the world, the persons to whom it is negotiated are to collect the state and relation of the parties from the bill itself. If they appear on the bill as partners, it may be of less public detriment to subject them to the inconvenience of being treated as such, than to permit them to deny that they are so.

The Court took time to deliberate, till *Tuesday* the 4th of *February*, when Lord *Mansfield* delivered their unanimous opinion, That the *Maydwells*, by making the bill payable “to our order” had made themselves partners as to this transaction.

The rule made absolute.

At the ensuing *Sittings* at *Guildhall*, on *Monday* the 3d of *March* 1783, the new trial came on, before Lord *Mansfield*, and a special jury; when

Wallace for the defendant, stated and offered to prove, that by the universal usage and understanding of all the bankers and mer-

chants in *London*, the indorsement was bad, because not signed by both the payees.

Howorth, on the other side, objected to any evidence of that sort, insisting, that the point was a question of law, and had been decided by the Court.

Lord *Mansfield* said, he did not think the question was so decided as to preclude the evidence offered; and therefore over-ruled the objection.

Wallace then called Mr. *Gosling* an eminent banker, to prove the usage; but the jury *una voce*, declared they knew it perfectly to be as he had stated it; and, without hearing the witness, found a verdict for the defendant.

In the case of *Whitcomb* against *Whiting* ^m, it has been determined that an acknowledgment by one partner is sufficient to take a case out of the statute of Limitations as against the others. In this case there was a declaration, in the common form, on a promissory note executed by the defendant: Pleas;

^m Dougl. 651.

the general issue, and *non assumpsit infra sex annos*. Replication; *assumpsit infra sex annos*.

The cause was tried before *Hotbām*, Baron, at the last assizes for *Hampshire*. The plaintiff produced a joint and several note executed by the defendant, and three others; and, having proved payment, by one of the others, of interest on the note, and part of the principal, within six years, and the Judge thinking that was sufficient to take the case out of the statute, as against the defendant, a verdict was found for the plaintiff.

On *Friday* the 4th of *May*, a rule was granted to shew cause, why there should not be a new trial, on the motion of *Lawrence*, who cited *Bland v. Haslerigⁿ*; and this day in support of the application, he contended, that the plaintiff, by suing the defendant separately, had treated this note exactly as if it had been signed only by the defendant; and therefore, whatever might have been the case in a joint action, in this case, the acts of the other parties were clearly not evidence against him. The acknowledgment of a party himself does not amount to a new

ⁿ C. B. H. 1 & 2 W. & M. 2 Ventr. 151.

promise, but is only evidence of a promise. This was determined in the case of *Heylin v. Hastings* o, reported in *Salkeld* p 9. 12 *Modern*; and in *Hemmings v. Robinson* q, it was decided, that the confession of nobody but a defendant himself is evidence against him. That last case was an action by an indorsee of a note, against the drawer, and the plaintiff proved the acknowledgment of a mesne indorser that the indorsement on the back of the note was in his hand-writing; but the Court was of opinion, that this was not evidence against the drawer, but that the indorsement must be proved. It would certainly open a door to fraud and collusion if this sort of evidence were, in any case, to be admitted. A plaintiff might get a joint drawer to make an acknowledgment, or to pay part, in order to recover the whole, although it had been already paid.

Lord *Mansfield*—The question here, is only, Whether the action is barred by the statute of Limitations? When cases of fraud appear, they will be determined on their own circumstances. Payment by one, is payment

o B. R. H. 10 Will. 3.

p 1 Salk. 29. 223.

q Barnes 4to Edit. 436.

for all, the one acting virtually as agent for the rest; and, in the same manner, an admission by one, is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due.

Willes Justice—The defendant has had the advantage of the partial payment, and therefore must be bound by it.

Ashburst and *Buller* Justices, of the same opinion.

The rule discharged.

The case of *Bland v. Haslerig* (cited *supra*) was a joint action against four: the *plea*, the statute of Limitations, and a *verdict*, that one of the defendants did assume within six years, and that the others did not; and it was held by *Pollexfen* Ch. J. *Powell* and *Rokeby* (against *Ventris*) that the plaintiff could not have judgment against that defendant who was found to have promised within the six years. But according to the principle in the preceding case of *Whitcomb v. Whiting*, the jury ought to have considered the promise of one as the promise of all, consequently that all the partners were liable.

Acts subsequent to the time of delivering goods on a contract may be admitted as evi-

dence to shew that the goods were delivered on a partnership account, if it were doubtful at the time of the contract: but if it clearly appear that no partnership existed at the time of the contract, no subsequent act by any person, who may afterwards become a partner, (not even an acknowledgment that he is liable, or his accepting a bill of exchange drawn on them as partners for the very goods) will make him liable in an action for goods sold and delivered; though he will be liable on the bill of exchange.

Thus in the case of *Saville v. Robertson and Hutchinson*^r.

This was an action for goods sold and delivered, brought under the following orders of the Lord Chancellor, made upon the petition of the plaintiff and others in the bankruptcy of the defendants; “ I do order that the petitioner *W. Saville* be at liberty to prosecute such action at law as he shall be advised for the value of the said copper, &c. in the defence to which action the said bankrupts are not to set up their bankruptcy; and all books, &c. to be produced, &c. and all further directions on the matter of the petition are here-

by reserved until after the trial, &c. Dated 2d *August* 1790." "I do order that the petitioner *W. Saville* be at liberty to try the said action for goods sold and delivered, as directed by my order made in this cause on 2d *August* 1790; with liberty, if the Court wherein the said action shall be tried shall think fit, to give the said bills in evidence, without prejudice to the form of the action, as now directed: and all further directions, &c. reserved, &c. Dated 7th *May* 1791."

At the trial, a special case was reserved, which stated as follows:—

In *April* 1787, the defendants and one *Samuel Pearce*, since deceased, and *William Robertson*, since a bankrupt, entered into the following articles of agreement:—

Articles of agreement made this 19th of *April* 1787, between *J. Robertson* and *J. Hutchinson*, of *London*, merchants and copartners, as well on the part and behalf of themselves as of others who have or shall subscribe their names on the back of these presents, of the one part, and *S. Pearce*, of, &c. merchant, of the other part, &c.

Whereas

Whereas the said *S. Pearce* is the sole owner and proprietor of the ship *Triumph*, &c. and whereas the said *J. Robertson*, *J. Hutchinson*, *S. Pearce*, and others, who have subscribed their names on the back of these presents, have mutually *agreed upon a joint undertaking and risk as to profit and loss in a certain voyage* or maritime adventure about to be performed under the direction of the said parties, who have or shall have a majority of interest therein, or of a committee appointed by them; now these presents witness that they the said *J. R.* and *J. H.* on behalf of themselves, and all others who have or shall subscribe, &c. and the said *S. P.* for himself, in consideration of the trust which they severally repose in each other, and also in pursuance of the said agreement, have and do each for himself, his heirs, executors, &c. mutually covenant and agree with each other, &c. 1st, That the said ship *Triumph*, whereof the said *S. Pearce* is sole owner, shall from the day of the date, and until her return from her intended voyage, be at the disposal, direction, and risk of all the parties hereto jointly, at the valuation of 3750*l.* &c. 2d, That the said *J. R.* and *J. H.* by themselves and others who have or shall subscribe, &c. shall and will on or before the 24th *August* next, procure and
provide

provide a cargo of goods for the said intended voyage to the value of between 22,000*l.* and 25,000*l.* and *which goods shall in the judgment and opinion of the majority of the parties to these presents be deemed eligible and proper for the voyage and markets; and that the said goods shall be furnished or purchased at the lowest cash prices, although not payable till the usual period of credit is expired; the difference between the said cash terms and the given credit to be made good by giving bonds, bearing interest from the date of the contract of such goods; and that they the said J. R. and J. H. and other the persons who subscribe, &c. shall and will prepare and ship the said cargo at such time and in such manner as the majority of the said concerned, or their committee shall direct. That all additional out-fits of the ship *Triumph*, in cables, &c. which she may require, &c. after the date hereof, &c. until her voyage be concluded, shall be on the joint account, &c.* 4th, That in case the said *S. Pearce* shall be desirous to increase his interest in the *said joint concern*, he shall be permitted so to do, by shipping on *the joint account* as many goods, over and above the goods to be shipped by the said *J. R. J. H.* and others who shall subscribe, &c. as he may think proper: but the
said

said goods so to be shipped by the said *S. Pearce* are to be *such articles as the majority of the concerned or their committee shall approve of* as proper for the voyage and market. 5th, That the said 3750*l.* together with the amount of the additional out-fits to be advanced by the said *S. Pearce*, the amount of half of the premiums of insurance to be made by the said *S. P.* on the said ship, freight and cargo, and such amount of goods as the said *S. P.* may ship on the joint account as above-mentioned, shall be considered *as the said S. P.'s share or capital in the said joint undertaking*; and he the said *S. P.* shall be entitled to receive the profit or bear the loss thereon, in the exact proportion as the amount of all such sums shall be to the remainder or other part of *the said joint concern*; and that the said *J. R.* and *J. H.* and the subscribers, &c. shall receive the profit, or bear the loss in the like proportion as to the sums set opposite to their several names. 6th, Provided that *S. P.* shall get the insurances effected, and guaranty the solvency of the under-writers, if called upon; and when the policies are effected, each of the said parties is to hold his own respective proportion thereof, to the amount of his share and interest in the said joint concern. 7th, Although the said *S. P.* is to procure the

whole

whole of the said insurances on the said ship, freight and cargo, yet only half of the premiums of insurance shall be added to his interest in the said joint concern, pursuant to the 5th article : but all the said parties hold themselves bound with him to be answerable for the whole amount of the said premiums of insurance, and which is to be a charge on the voyage. 8th, That *S. P.* shall be the ship's husband to superintend such out-fits of the said ship as the majority, &c. shall deem necessary. (The 9th, relates to a schedule of the ship's tackle, &c.) 10th, That all money received on account of the ship, &c. shall be paid to the super-cargo on the joint account, 11th, That in case the said *S. P.* shall want the assistance of the said *J. R.* and *G. H.* or the subscribers, &c. to procure him the loan of any money to enable him to complete the out-fits, they engage to procure him 500*l.* to be repaid by him in manner as therein stipulated. (12th, Not material.) 13th, That from and after the said ship shall leave the port of *London*, all the expences on the voyage shall be paid by the super-cargo or agent for the said joint concern, who shall be supplied with money for that purpose, or be empowered to pay the same out of the proceeds of the cargo. And if the said super-cargo,
during

during the voyage, is under the necessity of drawing bills on either of the said parties for the same, or he shall think the drawing such bills more beneficial to the joint concern than reimbursing himself out of the said proceeds, then each of the said parties interested in the said maritime adventure shall bear and pay his respective portion of such bills. 14th, That the parties hereto, or a committee, shall appoint officers of the ship. 15th, That when the ship is ready laden for sea, and previous to her sailing, *J. R.* and *J. H.* shall deliver an invoice of her cargo to the super-cargo, who shall enter the same in proper books; and each party interested shall be therein credited with the amount of his respective accounts, and the super-cargo shall prepare a statement of the whole amount of the said ship, out-fits, cargo, and charges, declaring the exact proportions or shares which each person hath in the voyage, which shall be signed by each of the parties, and shall be a voucher for ascertaining the said shares hereafter, in profit and loss. 16th, That in case of any difference between any of the parties interested, it shall be referred to arbitration. 17th, That each party shall bind himself in the penal sum of 2000 *l.* for the performance of the articles.— Signed and sealed
by

by *J. Robertson*, *J. Hutchinson*, *S. Pearce*, and *W. Robertson*.

On the 28th *July* 1787, the following memorandum was indorsed on the said articles by the same persons: "Notwithstanding what may be understood to be the meaning of the foregoing articles, it is hereby declared by all the parties that the minute made on the 26th *June* last, and signed by us respecting each of us, holding the proportions of one quarter each, that is to say, *Robertson* and *Hutchinson* one half, and *S. Pearce* and *W. Robertson* one quarter each, it is now fully to be considered and understood that that minute is now declared null and void, and that each party whose name is hereunto subscribed is to hold no other share or proportion in the said concern than the amount of what each separately orders and ships; and which interest will be hereafter declared, agreeably to the true intent and meaning of this agreement. And it is further declared that the orders given for the cargo and out-fit of the ship, are to be each separately paid; and that one is not bound for any goods or stores ordered or shipped by the other. And that the said *S. Pearce* has free liberty to ship what goods are suitable for the voyage, over and
above

above the ship and out-fit, leaving room clearly for those ordered by *Robertson* and *Hutchinson*, and *W. R.* and it is to be understood that the ship is made over in trust for the general concern.”

In *May* 1787, the plaintiff, by the order of *Pearce*, supplied copper to sheath and repair the ship *Triumph*, to the amount of 482*l.* In *August* 1787 the plaintiff by the orders of *Pearce* delivered copper on board the said ship to the amount of 938*l.* 3*s.* 3*d.* which formed part of the cargo thereof.

In *October* 1787 the said ship sailed from *London* for *Ostend*, and proceeded from thence to the *East-Indies* with the goods so furnished by the plaintiff, and other goods on board. In *January* 1788, *Pearce* became a bankrupt, and *Saville* proved his debt under the commission against him; and in *February* 1788, *William Robertson* also became a bankrupt.

On the trial *Mr. Kaye*, the plaintiff's attorney, and who was solicitor to *Pearce's* assignees, swore that the defendant *Robertson* told him that in *September* 1789 there had been an agreement between him (*Robertson*) and *Pearce's* assignees that he should go down

to the coast to wait the ship's return from *India*; on her arrival he was to send word to the assignees, one of whom was to accompany him in the ship to *Ostend*, and there the ship and cargo were to be sold for the parties interested; that when the ship arrived, which was in *July* 1789, he (*Robertson*) went on board, and, without sending advice to *Pearce's* assignees, carried her to *Ostend*, and sold her for his own and *Hutchinson's* benefit; that his reason for not keeping his engagement with *Pearce's* assignees was, that he and his partner were liable to pay the whole debts for ship and cargo, and therefore he had possessed himself of the whole to answer those debts; and if there were a surplus he would account to *Pearce's* assignees for a proportion of it.

On the 29th of *October* 1789 the defendants accepted two bills of exchange of that date for the amount of the copper supplied by the plaintiff, drawn by the plaintiff payable two months after date, and stated to be for value delivered in copper to Messrs. *S. Pearce* and Co. In *January* 1790 before either of the bills was paid the defendants became bankrupts.

This case was argued in the last term by *Adam* for the plaintiff, and *Burrough* for the defendants; and again on this day by *Bower* for the former and *Bearcroft* for the latter. It was admitted that the plaintiff was entitled to recover for the copper for sheathing.

It was argued for the plaintiff, 1st. That the defendants were liable for the rest of the goods, as partners, on the construction of the articles, coupled with their subsequent acknowledgment, and their acceptance of the bills of exchange, drawn for the very goods; and these cases were cited, *Abbott v. Smith*, 2 Bl. Rep. 947. *Bloxam v. Pell*, cited in 2 Bl. Rep. 998. *Hoare v. Dawes*, Dougl. 371. 3d edition; and *Coope v. Eyre*, H. Bl. Rep. 39. But 2dly, If the plaintiff could not recover in an action for goods sold and delivered, that the defendants were liable on their acceptance of the bills; and that the Lord Chancellor intended by the second order to give the plaintiff an opportunity of recovering either in the one form or the other. These points were resisted by the counsel for the defendants; the first on this ground, that the defendants were not partners at the time when the contract was made; and that, though

though their subsequent acts might explain the original contract, if it were doubtful at the time, they could not alter the original contract against the intention of the parties, as expressed in the articles.

On the second head it was said, that the meaning of the order was only to permit the bills to be given in evidence to explain the intention of the parties on the whole transaction, but not to make the bills the foundation of the action, which was expressly ordered to be brought to recover the value of the copper.

Lord *Kenyon* Ch. J.—“ Some of the points made at the bar admit of no doubt. It is clear that, if all these parties had been partners at the time when these goods were furnished, though that circumstance were not known to the plaintiff, they would all have been liable for the value of the goods. It is equally clear that such an action might be maintained against the dormant partners alone, unless they pleaded in abatement. Nor can any doubt be entertained but that, if this had been an action on the bills of exchange, the plaintiff might have recovered: there was a consideration for them; and

C c 2

being

being in writing, the statute of Frauds would have been satisfied, though they were promises to pay the debt of another person. But my difficulty arises from the form of this action, which is for goods sold and delivered; for I do not see how any act, which passed subsequent to the delivery of the goods, can have any retrospect so as to alter the nature of the contract, which was not doubtful. It might have been evidence to explain it to be a partnership contract, if the contrary had not expressly appeared. The facts of the case are shortly these; several persons who had no general partnership, nor any connection with each other in trade, formed an adventure to the *East-Indies*. The outfit of the vessel was a joint concern of all the partners; and that delivers the case from one consideration, namely, the parcel of copper for sheathing the ship; which is admitted to be a partnership concern. But beyond that I see no partnership between the parties till all the parcels of the cargo were delivered on board; and that made it a combined adventure between all the parties. It was very properly asked, in the argument, if they were partners when the cargo was delivered, what share had *Pearce*; by the articles he was not to bring in any definite aliquot part of the cargo;

cargo; but the agreement only was that he should share in proportion to the part he should bring in; it was optional in him whether or not he would bring in any goods; and by another part of the agreement, if he were under any difficulty in bringing in the money, the others were to lend him credit. It is true, that it was to be determined by a majority of those concerned in the adventure, whether the goods, which were to be sent to market, were or were not proper; and so far they all looked to each other's acts; but each of them was to bring in his share only; and I cannot distinguish this case from that put at the bar, where several persons were to contribute their separate *quota* of money, and they applied to different scriveners to procure it; they could not all be liable for the capital which each should borrow. At the time when this copper was furnished, *Pearce* stood in no relation whatever to the other persons, but he alone bought the copper in his own name, without carrying to market the name of any other person but his own. Suppose the plaintiff had brought an action for this copper the instant it was delivered on board; against whom must the action have been brought? *Pearce* only; for he alone was answerable at that time. I cannot there-

fore see how it can be said that these goods, which were sold to *Pearce* only, and on his sole credit and account, were sold and delivered on the partnership account. Afterwards indeed these defendants were to gain or lose by the joint cargo; when the other goods were brought in, the partnership arose; but each was to bring in his own particular stock. But in this case I think that the question stops short of affecting the defendants; and I cannot see how the plaintiff can have a right to call on the defendants, as partners, for the value of these goods, on a supposed contract, when the real contract between the buyer and seller was consummated before the joint risk began. Suppose several persons agreed to open a banker's shop, and it was agreed that each partner should bring into the house a certain sum of money as his share, it could not be contended that, if one of them were to borrow money for his share, all the others would be liable for it. The great question however still is, Whether under all the circumstances of the case, all these parties are answerable; I think they are, but they can only be adjudged to be responsible in another form of action, and not in this, which is an action for goods sold and delivered. If the action had been brought

brought upon the bills, I think they would have been liable."

Ashhurst J. This case comes before us much entangled in the form of it: but at present the inclination of my opinion is, that even in this form of action for goods sold and delivered, the plaintiff may recover. I admit that evidence subsequent to the contract cannot vary the nature of the contract, but it may explain the intention of the parties to the original contract. If the ordering of the goods by *Pearce* were the only evidence in this case, he alone would be answerable for the payment of them: but, when he bespoke them, it is clear that he did it with a view to a partnership transaction; and that this was a joint concern, was shortly afterwards explained by the memorandum of *July 1787*, which is indorsed on the articles; both of which must be taken into consideration together, in order to see the nature of the contract. The fourth, fifth, and fifteenth articles, are strong to shew that this was a partnership concern. By the fourth, *Pearce* was to be at liberty *to ship on the joint account* as many goods as he chose, provided they were such as the majority of those concerned should approve. Now if this were not intended to be a partnership

account, the rest of those concerned in the adventure could have no interest or concern in the goods shipped by him : but if they were all to share in the profit and loss of the whole adventure, then there was good reason why they should have an opportunity of approving of those goods. The fifth article shews this still more strongly ; it is that the 3750*l.* &c. and such amount of goods as *Pearce* may ship *on the joint account* as above-mentioned, shall be considered as *Pearce's* share or capital in *the said joint undertaking* ; and that he shall be entitled to receive the profit or bear the loss in proportion, &c. on the *joint concern*. Now a partnership is a joint undertaking to share in the profit and loss ; but such was this undertaking : it was not only a joint concern in the ship, but also in the cargo. The fifteenth article also is material ; which directs that, previous to the ship's sailing, books shall be kept, in which each party interested shall be therein credited with the amount of his respective accounts, and that the books shall be signed by the parties, which shall be a voucher for ascertaining the shares hereafter in profit and loss. Now that clearly evinces what was the original intention of the parties. It is true that when the contract was made, the goods were not furnished on the joint credit
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of *Pearce* and the defendants, but of *Pearce* alone: but that is the case with dormant partners, and there the party furnishing the goods may resort to all those who are entitled to share in the profits. For though in such case the dormant partners may not be known at the time of the contract, yet when that fact is ascertained, the creditor has a right to avail himself of that evidence. The evidence of *Kaye* likewise is important; for he proved an acknowledgment by one of the defendants that they were liable to pay the whole debt for the ship and cargo. This shews that they considered themselves as partners in the original transaction. And though subsequent evidence will not make a new contract, it may explain what that contract was. However, if this opinion be not well founded, the plaintiff would be entitled to recover on the bills of exchange.

Buller J. It is for the interest of all the parties that we should now dispose of the case before us, whatever may be done hereafter in the Court of Chancery. For if the grounds on which we proceed be distinctly known, it will put an end to further litigation. The only difference of opinion between my Lord Chief Justice and myself, arises on the last order of
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the Court of Chancery; but that order, I think, will be best explained hereafter by that Court. If this be considered purely as an action for goods sold and delivered, brought adversely in a court of law, and unconnected with the proceedings in the court of equity, I entirely agree with my Lord that the plaintiff cannot recover against these defendants the amount of *Pearce's* share of the cargo. To make this case clear, suppose these defendants and *Pearce* had agreed to be concerned in a joint adventure, in which they were to be interested according to the proportion which each furnished, and that each were to bring in goods to the amount of 900*l.* and suppose the two defendants had paid for their shares, and *Pearce* had not, and that the defendants were also to be liable with *Pearce* for his share, in that case they would be liable for 900*l.* each more than *Pearce*, and would not be entitled according to the proportion which each brought in. In the argument an attempt was made to distinguish between the time of the contract and the time of the delivery: it is certainly true that if one partner order goods himself, without disclosing the names of the other partners, and the goods be afterwards delivered to them all, they are all liable, because the delivery and the sale
are

are considered as forming one entire contract, and the delivery is supposed to be according to the sale. In such a case the one partner who buys the goods, does not contract for himself, but on account of the partnership. In that way of considering the question, upon the first order of the Court of Chancery, I think the plaintiff could not recover against these defendants for the amount of the goods sent in *August*, as *Pearce's* share, in an action at common law for goods sold and delivered; because the goods were neither sold or delivered to the partnership. But that would be to dispose of the case according to the mere form of the action. But, according to my construction of the second order, we are not to consider the question in that light; for it is ordered that the plaintiff may give the bills in evidence, without prejudice to the form of the action; and therefore I think that this case is to be considered on the broad ground of substantial justice. This lets in the other question, whether, if the action had been brought on the bills, the plaintiff would not be entitled to recover? And that he would, I think no doubt can be entertained; for the bills of exchange were given for a good consideration. The defendants took possession

possession of the cargo, declared themselves liable for the amount, and accepted bills expressly drawn for the value of the cargo ; and therefore upon those bills the plaintiff might unquestionably recover. Considering this as an action brought under the direction of the Court of Chancery, I think it is our duty to state the law upon the whole of the case.

Grose J. We must consider this case, as the record states it to be, as an action for goods sold and delivered. And I cannot distinguish it from that put in argument, of several persons agreeing to enter into partnership, each bringing in a stipulated sum of money, and each borrowing his proportion of different persons ; in which case it is impossible to say that the persons advancing the money could maintain actions against all the partners for the several proportions lent to each. But if the question were whether *any* action would lie, I have no doubt but that the plaintiff might recover against the defendants on the bills of exchange ; which are written contracts, and were given for a valuable consideration, the defendants at that time being in possession of the whole of the cargo.

Lord

Lord *Kenyon*, Ch. J. then said he hoped it would be remembered, when this case was returned into Chancery, that this Court were unanimously of opinion that on the whole justice of the case the plaintiff was entitled to recover.

CHAPTER XIV.

Of altering and putting an End to Partnership.

THE partnership contract being in its nature free and voluntary, may be altered or dissolved at the will of all the parties, and that even before the expiration of the term for which it was originally entered into: but in this case there must be a complete mutual consent. Such is the doctrine of our civil law^a: and indeed the very tie or state of brotherhood which must necessarily exist among partners, being founded upon the reciprocal choice which the partners themselves make of one another in their respective hopes of profit, it naturally follows that a partnership lasts just as long as the partners persevere in their consent to continue it. But if either of the partners should see occasion to relinquish the partnership, whether it be on account of an unsuitableness of temper and disposition between the parties, or because one particular partner is averse to making speculations in trade, or engaging in some project.

^a *Tamdiu societas durat quamdiu consensus partium integer perseverat.* D. l. 65. s. 3. ff. *pro socio*.

ed scheme or enterprize, which, in the opinion and judgment of the rest, carries with it a fair prospect of success; or, for any other unforeseen reason, he may withdraw himself; provided he does not break off with some sinister view, which is contrary to the rules of good fellowship, and the integrity of merchants, and tends to the prejudice of the other partners; or, provided he does not quit after some particular business is begun, or, at an unseasonable time, which might occasion loss, or damage to the partnership.

In the first place, if a partner withdraws himself through some sinister view or unfair design, he probably may disengage his copartners from all engagements to him, but does not disengage himself from his obligations to them; because such a fraudulent abandonment of the partnership cannot in equity free the person, who so abandons, from his engagements. Thus also if he quits before the expiration of the time which the partnership was to have lasted, abandoning a business which he was particularly charged with, and thereby occasioning the loss of some profit which otherwise might have accrued to the partnership, he cannot in common justice be suffered to take advantage of such his own

wrong,

wrong, but, he must, upon every principle of justice, be made answerable to the extent of such losses. In like manner the partner who renounces the partnership at any unseasonable time, not only does not free himself from his engagements to his copartners, but is answerable for all the losses and damages which such his unseasonable renunciation may cause to the partnership. And it is established, upon sound principle, that if a partner should renounce his partnership whilst on a journey, or beyond sea, or engaged in any business on the partnership account; or if his quitting obliges the partners to sell or dispose of any merchandize to disadvantage; he shall be bound to make good the losses and damages which his leaving the partnership under these circumstances shall occasion. For a fraudulent and unseasonable renunciation, can never be permitted, whether the deed of copartnership, or the bare partnership contract had provided against it or not: and upon this plain principle, that it would be repugnant to that strict fidelity, which has been already shewn to be essential to the formation and continuance of a partnership, and is always understood to be comprehended in it.

PARTNERSHIP may be said to be properly dissolved by fairly destroying its constituent *unities*, thus is it dissolved by the effluxion or expiration of that *time*, for which it was originally agreed between the parties to continue their paction for the purpose of carrying on the joint trade, with a view to their mutual benefit and reciprocal advantage.

Partnership may also be dissolved by the disuniting their *possession*, under a mutual agreement after a complete liquidation of all accounts which concern the joint property; but, if all parties remain solvent, this can only be done by consent, for it would be contrary to equity, for one partner to renounce at an unseasonable time to the prejudice of the others. And as in partnership concerns, there must be one and the same *interest* throughout, whether each individual partner contributes equally or not,^b so likewise may that *interest* be disunited by adjusting and dividing the respective shares of the several partners according to agreement, and thereby dissolving the partnership. And, since the *title* of partners must be created by, or arise under one and the same agreement, so in like manner may it be destroyed.

^b *Ante* p. 7.

Where partnership is contracted for a single dealing or transaction, or on account of some particular commerce, and an end is put to such concern by it's being completed, the partnership is dissolved of course.

It is customary in regular partnerships to insert a clause in the articles, by which the partners covenant to submit to arbitration any matter or thing which may become the subject of controversy or dispute between them. And altho' in such cases the arbitrators are usually judges of the parties' own choosing and proceed in a summary way; yet, if duly authorised, their award is considered *final*, consequently binding upon the parties unless there should appear just grounds, either at law, or in equity, to set it aside.^c And it is a mode of dissolving partnership, very frequent amongst merchants and traders, and is considered a ready method of adjusting partnership claims. But in order to empower the arbitrators to proceed to the dissolving of a partnership, it would seem to be absolutely necessary for the parties, submitting to arbitration, to authorize the arbitrators to dissolve the partnership by inserting such their agree-

^c Dyer 356. 1 Nels. Abr. 124. 9 & 10 Will. 3. c. 15. s. 8.

ment in their submission, or in the condition of the bond or promise. In like manner as it is requisite, when partners agree to submit all differences which may arise relating to their business, or to any covenant in the articles of co-partnership to referees whom they may choose, that such their submission should have in it a power given to the arbitrators to examine the parties, as well as the witnesses upon oath.

Thus it was held in the case of *Wellington v. Mackintosh* d. Where one partner brought a bill against another, to discover and be relieved against frauds, &c. The defendant pleaded an agreement, that in case any difference should arise between them, it was to be referred; and that the matters in the plaintiff's bill relate only to the partnership, and yet have never been submitted to arbitration, nor has he ever proposed a reference, though the defendant offered, and was always ready to do it. Lord *Hardwicke* disallowed the plea; for as it was a bill to discover and be relieved against frauds, the arbitrators could not examine on oath, which, by the agreement, they should have had the power of doing.

d 2 Atk. 570.

D d 2

This

This came on before the Lord Chancellor, on the defendant's plea, that the plaintiff and he, on the 15th of *November* 1728, executed articles of copartnership, by which they covenanted to become joint traders as *Blackwall-Hall* factors, for eight years, and agreed in case any difference should arise relating to their business, or of any covenant in the articles, it should be referred; and avers, that all matters in the plaintiff's bill relate only to the partnership, and that they have never been submitted to arbitration, nor did the plaintiff ever propose a reference, or nominate any person to be an arbitrator, though the defendant offered, and was always ready to submit all matters to arbitration; and demands judgment, if he shall further answer.

Lord Chancellor. The plea ought to be disallowed in this case; and yet I would not have it understood, that such an agreement might not be made in such kind of articles, and pleaded; but such a clause should have in it a power given to the arbitrators to examine the parties, as well as witnesses upon oath. But this bill is to discover and be relieved against frauds, impositions, and concealments, for which the arbitrators could not examine the parties on oath. Persons might certainly have made such an agreement as would have oust-

ted this court of jurisdiction; but the plea here goes both to the discovery and the relief; and if I was to allow the plea as to relief, I could not as to the discovery, and then the Court too must admit a discovery, in order to assist the arbitrators, which is not proper for the dignity of the Court to do.

After partners have dissolved their copartnership on a final balance being struck and all accounts having been adjusted between them, the parties are no longer liable for each other; and on such dissolution of a partnership between *A. B. and C.* a power given to *A.* to receive all debts owing to, and pay those owing from the late partnership, does not authorize him to indorse a bill of exchange in the name of the partnership, though drawn by him in that name, and accepted by a debtor of the partnership after the dissolution: so that the indorsee cannot maintain an action on the bill against *A. B. and C.* as partners. Neither can such indorsee maintain an action against them for money paid to the use of the partnership, though in point of fact the money raised by discounting a note which he had given, (in discounting the bill,) be applied by *A.* to the payment of a debt due from the partnership.

Thus it was held in the case of *Kilgour v. Finlyson* and others,^c which was an action brought by the indorsee against the ostensible indorsers, who also appeared to be the drawers of a bill of exchange. Money paid, money had and received, account stated. Verdict for the plaintiff. The circumstances of this case were as follow. The plaintiff was a warehouseman and factor, the defendants were also warehousemen and factors in partnership from *Midsummer* 1785, to the 28th of *July* 1787, when the partnership was dissolved, and notice of the dissolution given in the *Gazette* as under.

“ Notice is hereby given, that the copartnership between *Thomas Finlyson*, *Thomas Galbreath*, and *Henry William Harper*, of *Bow church-yard*, warehousemen, under the firm of *Finlyson, Galbreath and Harper*, and also at *Glasgow* under the firm of *Henry William Harper and Company*, was by mutual consent dissolved this day; all demands upon the above firm will be paid by *Thomas Finlyson* of *Bow church yard*, who is impowered to receive and discharge all debts due to the said copartnership.

^c H. Black. 155.

Witness our hands, this 28th day of July,
1787.

Thomas Finlyson.

Thomas Galbreath.

Henry William Harper."

At the time of the above dissolution, one *Scott* was indebted to the partnership in 758 *l.* and the partnership indebted to *Sterling Douglas*, and Co. in 890 *l.* On the 21st of September 1787, *Finlyson* drew the bill in question in the name of the late partnership on *Scott*, payable on the 23d of November following, for 304 *l.* 2 *s.* which *Scott* accepted. On the 9th of October, *Finlyson* indorsed it, in the name of the partnership, to the plaintiff, who discounted it, by giving his own promissory note, for 304 *l.* 3 *s.* 6 *d.* payable on the 25th of November, (the difference of 1 *s.* 6 *d.* being on account of the note being due two days later than the bill). This note of the plaintiff's was indorsed by *Finlyson* to *Sterling Douglas* and Co. who discounted it, and received the money they had advanced by so discounting the note, back again from *Finlyson*, in part of payment of the debt owing to them from the partnership. When the note became due, the plaintiff paid it to *Sterling Douglas* and Co. Two days before *Scott's* bill became due,

Finlyson took it up, and gave in lieu of it, another bill to the plaintiff, accepted by *Lee, Strachan* and Co. but did not take back *Scott's* bill. Afterwards *Lee, Strachan* and Co's bill not being paid, and *Finlyson* having become a bankrupt, the plaintiff brought this action against all the partners, on *Scott's* bill, which remained in his hands, and obtained a verdict. A rule being granted to shew cause why this verdict should not be set aside, and a new trial granted, *Adair* and bond Serjts. shewed cause. They acknowledged that the action on the bill could not be supported, but contended that the plaintiff was intitled to retain his verdict, having paid money to the use of defendants, at the special instance and request of a person authorised by them, to receive and pay their debts.

Le Blanc and *Lawrence* Serjts. for the rule argued, that it ought to have been shewn, that the money was actually paid, in discharge of a partnership debt; if it were paid, when *Finlyson* had no right to pledge the credit of the partnership, it was not paid to the use of the partnership. But admitting that it was paid for a partnership debt, yet being paid without the knowledge and request of the defendants it could not be sufficient to raise an
assump-

assumpsit. *Finlyson* had no authority to borrow money to pay their debt, or to contract for them without their consent. This case must be considered as already decided by Lord *Kenyon* in the King's Bench. *Adair* replied, that in the case cited, it was only holden that an action could not be maintained on the bill of exchange. The reason of which was, that the bill being negotiable, and going into the hands of persons who might not know the consideration for which it was given, must be binding when given, or not at all. The authority of the drawer, must be independant of any application of the money. But no such inconvenience could arise from the action for money paid. It is admitted that *Finlyson* paid the money of the plaintiff in discharge of a partnership debt; he had full authority from the other defendants to receive and pay: he therefore applied to the plaintiff for his note, at their special instance and request.

Lord *Loughborough*.—I was of opinion at the trial, that there was an equity in fa-

^f In a case between the bank of *England* plaintiffs, and the same defendants, in which the circumstances were the same as the present; there was a demurrer to the evidence which was not argued in Court, but Lord *Kenyon* at the trial gave it as his opinion, that the action on the bill could not be maintained.

vour of the plaintiff, the money arising from his note being *de facto* applied for the benefit of the partnership, and the authority from the other partners giving him power to discharge their debts. But I am now convinced that I was mistaken.

Consider the nature of this transaction : *Finlyson* applies to *Kilgour*, to discount the bill accepted by *Scott*, and in part of the discount takes a promissory note from him ; *Kilgour*, before *Scott's* bill became due, changes it with *Finlyson* for another, accepted by *Lee, Strachan and Co.* returns that, and takes *Scott's* bill back again. Now all this was carried on, without any idea of the former partners being bound by it. On the 10th of *October*, long before the plaintiff's note was due, the defendant applied to *Sterling Douglas and Co.* to discount it, who accordingly did discount it, but received the money back again in part of payment of their debt owing from the partnership. When this note became due, the plaintiff paid it to *Sterling Douglas and Co.* but at that time no debt was owing to them from the partnership ; the payment therefore of the plaintiff, was not a payment to the use of the partnership. Though the money raised by discounting his
note

note before it was due, was in fact paid in discharge of a partnership debt, yet he cannot follow the money through all the applications of it made by *Finlyson*.

Heath and *Wilson* justices, of the same opinion,

Rule absolute for a new trial.

CHAPTER XV.

By Bankruptcy.

PARTNERSHIP may also be dissolved by bankruptcy, which needs no consent, but is too frequently unavoidable, for trade cannot always be carried on with that degree of success which is absolutely necessary to support it, however large the partnership capital may be ; neither can its success be always secured by the most unwearied diligence and attention, since it is the same in commerce as in every other path of life, those who pursue it, must necessarily be subject to the uncertain and fluctuating state of humanity. But, independant of this, the young and inexperienced merchant, with the fairest promises and expectations may, equally with the skilful and cunning trader commit an act of bankruptcy, and an act of bankruptcy by one partner is to many purposes a dissolution of the partnership, by virtue of the relation in the statutes which avoids all the acts of a bankrupt from the day of the bankruptcy ; and also from the necessity of the thing, all his property being vested in the assignees, who cannot

not carry on a trade^a. A commission of bankrupt is to be considered as an *execution*^b and not as an *action*; and where one partner commits an act of bankruptcy, and not the other, a commission will go against him, for he owes the debt. Therefore it was decided in the case *ex parte Crisp*^c, that a debt due from a partnership, is a legal debt to support a separate commission. So also in the case of *Crispe v. Perritt*^d, where it appeared that on the 1st of February, *Perritt* sued out a commission against *William Crispe* of *Chelsea*, dealer in wines and chapman, and on the 2d of the same month, he was declared a bankrupt by the acting commissioners. On the 15th of the said month, *Crispe* preferred his petition to the Lord Chancellor, alledging, that he was not indebted to *Perritt* on his separate account above 6*l.* but admitted he the said *Crispe*, together with *Edward Burnaby* and *James Barbut*, esq. as co-partners of *Ranelagh house*, were all three jointly indebted to the said *Perritt* for plaisterers' work, but he did not know in what sum; that he had not committed any act of bankruptcy, and therefore

^a Cowp. 448, 471.

^b 1 Vern. 153.

^c 1 Atk. 134.

^d C. P. 9th June 1743. Cooke's B. L. 20.

prayed

prayed that the said commission might be superseded.

On the hearing, the Lord Chancellor ordered, that upon *Crispe's* paying 100 *l.* into the bank, in the name of the accountant general, the major part of the commissioners should make a provisional assignment of the said bankrupt's estate to an assignee to be appointed by them, and that the parties should proceed to a trial at law in *London*, the then next *Easter* term, or at the Sittings next after, in the Court of Common Pleas, in an action of trover to be brought by the said *Crispe* against such assignee for some part of the goods seized by virtue of the said commission, and that all further proceedings under the said commission, except the making of the said assignment, should be stayed until after the said trial. The provisional assignment was accordingly made to the defendant *Per-ritt*.

On the 9th of *June* 1743, in pursuance of the said order, the action came on to be tried before Lord Chief Justice *Willes*, when it was proved that the said *Crispe* was a trader, and had committed an act of bankruptcy; and that he and his two partners, before the suing
out

out the said commission, were jointly indebted to the petitioner *William Perritt* in 426 l. and it not being proved that the said *Crispe* owed the petitioners any separate debt, Lord Chief Justice *Willes* doubted whether a separate commission against one partner for a joint debt due from him and his other partners could be regularly issued; and therefore directed a verdict to be found for the plaintiff, subject to the opinion of the Court of Common Pleas upon that point.

The case was argued in the following *Michaelmas* term, and a second time in *Hilary*. On the argument of the case it was principally insisted by *Crispe's* counsel, that as an action at law did not lie, the commission was irregular, and they desired the defendants to shew that such a commission was ever issued; but on a further argument the following precedents were produced.

“ *John* and *Patrick Crawford*^e were merchants and copartners, and became indebted to one *Caruthers* in 120 l. 16 s. 8 d.
 “ A commission issued against *Patrick* only, on a debt due from him and partners.
 “ *Caruthers* petitioned Lord *Talbot*, stating

^e Ex parte *Caruthers*. Cooke's B. L. 21.

“ these facts, and that *Patrick* had obtained
 “ his certificate, which was then lodged in
 “ order to be passed by the Chancellor ; and
 “ for this supposed irregularity in the com-
 “ mission, it was prayed the certificate might
 “ not be allowed. His Lordship declared,
 “ that where one partner commits an act of
 “ bankruptcy, and the other not, a commis-
 “ sion will go against him, for he owes the
 “ debt ; and dismissed the petition.”

“ *Henry Hewett* ^f and *William Ralphson* were
 “ merchants and partners ; *Hewett* lived in
 “ *London*, and *Ralphson* at *Venice*, and became
 “ justly indebted to *John Upton* : *Hewett* com-
 “ mitted an act of bankruptcy : *Upton* stated
 “ the facts specially to Lord *Macclesfield*,
 “ and obtained a commission against *Hewett*
 “ only.”

The Chief Justice was of opinion that the defendant's counsel had fully answered the challenge, and declared these two cases were in point, and that *a commission was to be considered as an execution, and not as an action* ; and after taking notice of the great inconvenience and prejudice it would be to trade, in case such commissions were not allowed, he,

^f Ex parte Upton. Cooke's B. L. 22.

by consent of all the other Judges, pronounced judgment, and declared that the commission was regularly issued, and that a verdict should be entered up for the defendant.

By the statute of *James 8*, “ A fraudulent *conveyance* shall be an act of bankruptcy.” Other acts that are fraudulent are not made acts of bankruptcy; but they are attended with the consequences of fraud, at *law*; which is, “ that *fraud* renders every act void ^h.”

So an assignment by deed of only a *share* of copartnership effects, to a *bonâ fide* creditor, will, notwithstanding, if done in contemplation of bankruptcy, itself become the very act .

But, there is indeed a case ^k which appears to contradict this position; where *Norcotts*, who were goldsmiths, after shutting up their shop, being indebted to several persons much beyond what they were able to pay; in contemplation of bankruptcy, and to give a pre-

^s 1 Jac. 1. c. 15. s. 2.

^h 4 Burr. 2239.

ⁱ Cooke's B. L. 112.

^k *Small v. Oudley*. 1 Burr. 480. 2 P. W. 427.

ference in payment to the plaintiff *Small*, (who, upon a pressing occasion, transferred to them 500 *l.* *South-Sea* stock, upon their engaging to transfer to him the like sum in the *South-Sea* stock, in a week or ten days at farthest, and giving a note for that purpose, on the 29th of *September* 1720, made an assignment of their share in a wine partnership with *Oudley*, amounting to 300 *l.* carried on solely in his name, (in which they had two thirds, and *Oudley* one third) as a security for transferring 500 *l.* *South-Sea* stock, and reciting the truth of the case. They at the same time assigned two leasehold estates to *Small*, for the same purpose. This assignment was made without the privity of the plaintiff *Small*. *Norcotts* never opened their shop again, but the very next day after making this assignment, went off.

The interest of the *Norcotts* in the wine trade was but 300 *l.* and *Oudley* had a right to carry on the trade till *Christmas* 1723.

The bill (which was against *Oudley*, and against the assignee under a commission issued against the *Norcotts*), was not brought by *Small*, till after that time: but an issue had been directed in another cause, to try “ whether

ther the said *Norcotts* were bankrupts at the time they executed an assignment to *Small* of a lease of certain houses, on the said 29th of *September 1720.*"

The above facts were admitted by the answers. And Sir *Joseph Jekyll*, Master of the Rolls, said this assignment was good, and established it.

But the authority of the case of *Small v. Oudley*, has been since much shaken by a decision in the Court of Common Pleas, expressly upon the ground of an assignment of *part* in contemplation of bankruptcy, being in itself fraudulent, and an act of bankruptcy¹.

So in an action of trover^m, where the question turned upon the validity of a deed of assignment, dated the 23d of *October 1778*, from the bankrupt to his son, of part of his real and personal estate. The assignment was impeached upon two grounds; the one, that the bankrupt had committed an act of bankruptcy prior to the execution of the deed; the other, that the deed itself was an

¹ 3 Will. 47. Cowp. 124.

^m Round and another v. Hope Byde, London Sittings after Michaelmas term 1779.

act of bankruptcy. The petitioning creditor's debt became due, on bond, the 3d of *January* 1779. The 7th of *April* following, the commission of bankruptcy issued. The bankrupt had carried on the business of a banker, in partnership with *Archer* and another; which partnership commenced the 1st of *June* 1776, and was dissolved the 28th of *March* 1778. But the bankrupt appeared to continue in business for a length of time afterwards. The bankrupt and his family lived at his seat at *Ware Park*, in *Hertfordshire*, having a house in town, in *White-Hart-Court*, *Gracechurch-street*, which he attended during the hours of banking business. *Green*, his servant, swore he was the only man who let people in and out at the town house. That in *August* and *September*, he denied several persons. That he had sometimes orders from his master to deny every body; at other times, such as he knew to be creditors: to one creditor, *Chipp*s in particular, by name. This witness was contradicted on the part of the defendant by another servant, who swore, that when any one came about business, he always called *Green*, who said he had not his master's orders to deny. The evidence of *Green* was also attacked on the score of its being new, the same not having been given before the commissioners,

missioners, but a different act of bankruptcy having been sworn to, and *Green* having threatened, by way of revenge for a quarrel, that he would ruin the family, and that it would have been better for them if they had paid him his wages. The defendant called other witnesses to prove the bankrupt's attendance at public meetings, and other places, during the months of *August*, *September* and *October*. The consideration of the deed of assignment could not be impeached. The defendant, as it appeared, had from time to time entered into engagements for, or advanced money to the bankrupt, more than the value of the estates, and that he had taken possession immediately on the execution of the deed. The bankrupt left *Ware Park* on the 26th of *October*, three days after the execution of the deed, and was not seen afterwards.

Lord Mansfield. A denial by order of a trader to a creditor, is not of itself an act of bankruptcy, but only evidence of it, and therefore to be explained. If a man is sick, or as this case is, if a man lives three days in business, and the rest of the week in the country, this explains a denial at any other house or lodging at any other part of the town, say-

ing, go to the shop. On the other hand, it is not necessary, in order to constitute a denial an act of bankruptcy, that the bankrupt should have given orders to deny *any particular person* by name: if he gives orders to be denied to *every body*, it includes creditors, and is a keeping house, within the meaning of the act of Parliament. As to the first point, whether an act of bankruptcy had been committed, previous to the execution of the deed, it rests chiefly on the evidence of *Green*. The second question will be material, if you determine for the defendant on the first. I take it to be clear law, that if in contemplation of bankruptcy, a man conveys to the fairest creditor that ever existed, it is not a fraudulent deed as *between them*; but it tends to defeat the whole bankrupt laws, and as such is held to be a fraud on the rest of the creditors. It is equally clear, that though it be not a conveyance of the *whole* property, and that a part be omitted, yet if it be made in contemplation of bankruptcy, it is a preference, and as such an act of bankruptcy. To apply this; the deed is fair as between the bankrupt and his son the defendant, but having been made three days before his absconding, it is a *preference*.

Verdict for the plaintiff.

In the case of *Haman* and others assignees of *Fordyce v. Fishar* n. Where a trader, in contemplation of absconding, inclosed certain bills to *F.* a particular creditor, in discharge of his debt; saying he had the honour to shew him that preference which he conceived to be his due. Which was done without the privacy of *F.* and followed by an act of bankruptcy before the notes could possibly be delivered. It was held by the Court that the *essential motive* being to give a *preference*, and the act itself *incomplete*, was clearly *void*, tho' in favor of a very meritorious creditor.

And in the case of *Hague v. Rolleston* o. It seems to have been fully established, what transaction of an absconding partner in favour of a partnership creditor, will be fraudulent and void, and prevent such creditor's being intitled to any part of the partnership effects. And also, how far the partnership may be said to be altered, or dissolved by such an act of bankruptcy.

This was a motion for a new trial, in an action of *Trover* brought to recover the value of seven bags of cochineal. It had

ⁿ Cowp. 117.

^o 4 Burr. 2174.

been tried before Lord *Mansfield* at *Guildhall*; and a verdict found for the plaintiffs: but a point of law arose on the following facts.

Anne and *Isaac Scott* were merchants and [copartners. On the 27th of *March* 1767, *Isaac* went out with intent to abscond; and did not return till after a commission of bankruptcy had issued against him, on the 30th, the defendant received a letter written by *Isaac Scott*, dated “*Dover* 28th *March*,” inclosing a bill of parcels, dated 23d *March*, of seven bags of cochineal, for 164½*l.* 14*s.* 6*d.* as if the defendant had purchased the same of the said *Anne* and *Isaac Scott*; and informing the defendant “that he (*Isaac Scott*) was gone off,” and “that he had deposited the seven bags of cochineal at *George Street*’s warehouse, in *Rolleston*’s name and for his use;” though, in fact he had not purchased or agreed to purchase any such goods of them: but the defendant imagined, it was intended to secure him in part of the debt due from the partnership. On the 30th of *March*, the defendant went to the warehouse of *George Street* in *Thames Street*, which was a public warehouse; where he found the seven bags of cochineal deposited there in his name: which he sold and disposed of, and applied the

the money to his own use in part payment of the debt due from them to him. They had been deposited there, with *Street*, on the 26th of *March*, for the defendant *Rolleston*. On the 25th, *Isaac Scott* told *Street*, “that they were for the defendant”: and they were so booked at the warehouse. But though the goods were sent to the warehouse *before Isaac Scott’s* act of bankruptcy (viz. his absconding and not returning;) yet the defendant did not then know that they were there: and he did not *declare his acceptance* of them, till *after* that time.

The plaintiffs were assignees in a joint commission which afterwards, on the 12th of *April*, issued against both the *Scotts*, *Anne* and *Isaac*. Sir *Fletcher Norton* and Mr. *Dunning* Solicitor General, insisted that the defendant was intitled to retain the *moiety* belonging to that partner, who did not become bankrupt till after *Rolleston* had declared his acceptance of the cochineal; though there was afterwards, a joint commission against both.

This act of *Isaac* bound *both* partners. His subsequent bankruptcy could only affect his own share in the partnership estate: it could
only

only affect the mother's. *Rolleston* stands in the place of the mother: and before her bankruptcy, he was *joint partner* with the assignees of *Isaac* in this cochineal; and had an *undivided moiety* in it. Besides a trader may prefer one creditor to another, *before* any act of bankruptcy. And here is no fraud or collusion in the defendant. Consequently, the *joint* assignees against mother and son cannot maintain this action of *Trover* against *Rolleston* for the *whole* of these goods. Mr. *Morton* and Mr *Wallace contra*, for the assignees under the joint commission. The mother's moiety was bound by *Isaac's* bankruptcy. All the *joint* effects are bound by the bankruptcy of *either* partner, the messenger under the joint commission of bankruptcy might have seized the *whole*, if they had remained in their warehouse. Since a delivery as this was, under a private order of *Isaac*, unknown to *Rolleston*, and unknown to *Anne Scott*, was no sale to *Rolleston*. The goods were not appropriated to him, *till after Isaac Scott's* bankruptcy: and *after* his bankruptcy, he had no right to sell. He could not, *after* that, bind the partnership effects. *Rolleston* took the goods *under the bill of parcels* which was sent by *Isaac* from *Dover*; at which time he was a bankrupt: and consequently, *Anne Scott's*

Scott's share was liable to be seised under the commission against *Isaac*. On the other side it was urged in reply, that *Isaac Scott* had, at *the time* of the act done, a right to dispose of the goods: his act was the act of *both Isaac and Anne*. His subsequent bankruptcy, only rescinded *his* interest, but leaves *Anne's* interest in *Rolleston*. The assignees of *Isaac*, and she, were tenants in common of the goods. The Court must consider it as if *Anne* had never become a bankrupt: for *Rolleston* stood in her place. The act of *Isaac*, when both partners were solvent, was, the act of *both* partners, and bound *Anne's* share as well as *Isaac's*. Therefore her subsequent bankruptcy signifies nothing: for her assignees can only stand in her place. *Street's* warehouse was a public warehouse. And as soon as *Rolleston* signified his assent to the contract, it was *perfected*. Indeed *Isaac's* share was gone, by his prior bankruptcy: but as to *Anne's* share; the contract was perfected, and *Anne's* share was bound by it: and on the 30th of *March*, (which was prior to *Anne's* bankruptcy) *Rolleston* was intitled to her share.

Lord *Mansfield*—"under a joint commission, the commissioners assign the effects of
both.

both. On an application *ex parte Turner*, in *March 1742*, it was holden, that the joint commission carries *all* the effects, both joint and several p. Consider, here, the effect of booking the cochineal on the *26th March*, in the name of *Rolleston*; and whether it does not go to the whole. And the subsequent assent, if it does any thing, must go to the whole. The assent could not be good for part; and not good, for the other part. But the assent was to nothing at all. The deposit was not completed, antecedent to the *30th of March*. I was clear at the trial, that this assent could not be good for the whole; because there was nothing to assent to: nor did *Rolleston* in fact assent to any thing but the false bill of sale sent to him from *Dover*. And that bill of sale was after the act of bankruptcy committed by *Isaac Scott*. Therefore he could not then affect the partnership; which was at an end, by the bankruptcy. And *Rolleston's* assent was to the false bill of sale, sent to him to make him a creditor upon a false foundation of a dealing upon speculation."

Mr. Justice *Tates*—*Isaac's* contract must bind the whole, or not operate at all: it could

not be good for one part, and not for the other. His act was *not complete* upon the 26th *March*: it was *revocable* till *Rolleston's* assent; and he must assent to the *whole* contract, if he assented at all. All *Isaac's* power was gone, when he wrote from *Dover*. HIS ACT OF BANKRUPTCY DISSOLVED THE PARTNERSHIP.

The assignees of *Isaac* could never be said to be partners with *Anne* the other partner. The transaction is void, and seems a fraud: there is no account stated; a voluntary deposit is made, to favour *Rolleston*. Therefore *Isaac's* act was void, and had no effect on the moiety belonging to *Anne*.

Mr. Justice *Aston* and Mr. Justice *Willes* were of the same opinion.

CHAPTER XVI.

By Death.

PARTNERSHIP is also dissolved by the death of one of the partners: for, altho' partnership may be entered into by the consent of many, nevertheless it must be dissolved by the death of one, unless special covenants were made to the contrary at the time of forming the partnership^a. And it would be unreasonable if it were otherwise; for it might have been entirely owing to the industry or skill, the knowledge or the capital of that particular person that the partnership contract was concluded; or these might have been the chief considerations which first induced the parties to treat about, or enter into such an engagement.

And partnership being dissolved as above stated, by the death of one partner, his executor or administrator enters of course into all the rights of the person to whom he succeeds, yet such executor or administrator of a partner not being a partner himself, has no right

^a Just. Inst. lib. 3. tit. 26.

to interfere with the partnership concerns in the quality of a partner. But at the same time he is entitled to the profits which would have fallen to the share of the deceased. So it has been determined, that the death of a partner, unless it be specially provided against in the instrument constituting the copartnership, *dissolves it*, and it shall not subsist for the benefit of an executor: the reason of which is said to be, that *primâ facie* this species of contract is entered into on the ground that both parties have skill in the business in which they engage, but an executor may have no skill therein: yet a temporary disorder, as lunacy, intervening, if there be a prospect of recovery, is no ground for dissolving a partnership.

Thus in the case of *Pearce v. Chamberlain*, at the *Rolls*, *October* 30th, 1750, which is reported as follows b.

Articles between *Robert Plummer* and *Daniel Pearce* recited, that *Plummer* had carried on the trade of a brewer, at *Hoddesdon*, and had employed *Pearce* as a servant and brewer; who having behaved himself faithfully, &c. and advancing a moiety of the value of

b 2 Vcz. 33.

the effects, he took him into partnership for nine years, if *Pearce* should so long live; but if he lived to the end of the nine years, the partnership should continue for any further term not exceeding twenty-one years, as *Pearce* should desire, on giving notice to continue it. It was provided, that notwithstanding the death of *Plummer*, it should be carried on by his representatives; and that if *Pearce* should give that notice, he should not have it in his option to pay off the representatives of *Plummer*, and carry it on himself; but with them.

This bill was by the widow and representative of *Pearce*, against the representatives of *Plummer*, for an account, and for liberty to carry on the trade with the defendants.

For the defendants was cited *Godfrey v. Browning*, 17th Mar. 1742, where it was held, that one copartner could not appoint a representative to carry on the trade after his decease; otherwise it might fall to the lot of an infant or person not at all fit to carry it on; and *Baxter v. Burfield*, B. R. Pasch. 1746. where it was held, that a covenant to teach a boy his trade was rescinded by the death of the master, on the ground that it was a bond to serve

serve personally, and that he was not bound to serve an executor.

For *plaintiffs*. It might be so where it is a general partnership; for then the death of one partner would determine it: but not so where a particular term has been agreed on: but if there was a case for that, it would not do here; because the provision for the representatives ought to be mutual; and shews, they did not guard against an infant's carrying it on. No case is cited to shew, that all partnerships must continue or conclude on the living or death of the principals. On the death of the master the boy cannot become apprentice by a course of representation, as then it might be to the most ignorant person: but that is different from articles of copartnership in a beneficial trade, wherein a right has been purchased for a period of years. In the case of *Huddleston*, one party was a lunatick, who could not carry on the trade; yet Lord *Talbot* thought himself bound by the articles, and obliged the other to carry it on for the benefit of himself and the lunatick.

Master of the Rolls.—“ Considering the whole frame and design of the articles, *Pearce* was only admitted in case of *Plummer*, and

for his skill in the trade ; and after that end was defeated by his death, it could not be the intent that any *representatives* of him should have an opportunity to carry it on, as it might fall into such hands as could not be of service : and though it might come to the *representatives* of one, and not of the other, that is, by express provision of the parties, therefore on the articles, the plaintiff is not entitled to a decree to carry on the partnership.

“ But as a general question, the consequence with regard to trade weighs greatly with me. It would be of ill consequence in general to say, that in articles of partnership in trade, where no provision for the death of either is made, they might subsist for benefit of an *executor* who may not have skill therein. The *plaintiff* could be of no use in carrying on the partnership. *Plummer* wanted one whose knowledge he could confide in. The *plaintiff*, the administratrix, is entitled to one third, the infant to the other two shares. Her intestate might be indebted, and the effects wanted to be distributed. It is improper therefore to suffer such a construction, unless the parties provide for it. I remember that case in *B. R.* It was an action
against

against the surety in a bond conditioned for performance of the articles: the master, to whom the youth was bound, died; the executors thought they might make some benefit of his time, and their view was therefore not to have him personally their servant, and to instruct him farther in the trade, but to put that benefit of the infant's service into their own pocket. The Court considering the inconveniencies attending apprentices, or trade in general, if infants were obliged to serve executors or administrators for remainder of the term, although not of the same trade with the infant, determined it for the defendant, that the action would not lie. I also remember *Huddleston's* case; and am pretty certain (though not very positive) that he was under a great dejection of mind, so that a commission was applied for; but before that question came before the Court, he had recovered himself, and was desirous to carry on the partnership. The Court said, these were accidents that could not be provided for; but that was no reason, when he had brought all his substance into trade, the other partner should say, that a temporary disorder intervening should deprive him during life from going on with the business, and that he should put the whole benefit of the

partnership into his pocket, without accounting for it. So that the Court held, he had not forfeited the benefit under the partnership, but should, notwithstanding that accident, be considered as a partner. That case depended entirely on that circumstance; and there was a prospect of his recovery.

It may be also noticed in this place, that partnership is dissolved by forfeiture upon an attainder of felony or treason, which is, in contemplation of law, the civil death of the attainted partner, and has the same effect with regard to the partnership as *natural* death. For such person having no capacity to act, he is with regard to the partnership as if he were really dead; and his property being confiscated, his share is of necessity withdrawn.

And it is in general true that partnership may be altered or put an end to in all the several ways above set forth. But, although the foregoing will be found to hold good as general rules applicable to most cases, concerning the dissolution of partnership, and the manner in which the engagements of partners descend to their executors or administrators, yet there are exceptions, such as the partnerships of *farmers*, for instance, in which
it

it is necessary to distinguish two kinds of engagements; one of the partners among themselves, and the other of all the partners to the person of whom they take a farm. For since this last engagement descends to the executors or administrators of the partners c, it is a necessary consequence that being under a common engagement to others, they must be mutually engaged to one another. And if this tie does not make the personal representatives and the survivors copartners in like manner as those are who have voluntarily chosen one another, yet it has this effect, that the executor, or administrator of a farmer being bound to perform the conditions of the lease to the lessor, and having the right to manage the farm, or to cause it to be managed for his advantage, this right, and this engagement distinguishes his condition from that of the executors and administrators of partners, in other concerns; inasmuch as he cannot be excluded from reaping his share of the benefit of the farm, even although the partners had not begun to manage it before the death of the partner to whom he succeeds.

c Leases for years being chattels, go to the executor. Doctor and Stud. lib. 1. c. 7. and c. 24.

And this doctrine seems to be consonant with the general rule respecting the right of SURVIVORSHIP among partners; for since every man has a natural right to the fruits of his own employment, so also is there a power vested in every man to dispose of such fruits, whether engaged in a partnership concern at the time of his death or not, it being agreeable to natural justice that the fruits of every man's trade should descend to his representatives, for the benefit of his children and family. Hence it is that our laws have established the salutary rule that there shall be no benefit by survivorship in copartnership dealings ^d; and which seems also to be founded on the *Lato Merchant*, for we find in *Littleton* ^e, that “the wares, merchandizes, debts, or duties of joint merchants or partners, shall not survive, but shall go to the executor of him that deceaseth; and this is *per legem mercatoriam*, which is part of the laws of this realm, for the advancement and continuance of commerce and trade, which is *pro bono publico*; for the rule is, that *jus accrescendi inter mercatores pro beneficio commercii locum non habet*.” And this rule extends to all mer-

^d 11 Co. 3. b. 2. Ro. Abr. 86. b. 2.

^e Co. L. 182. 2.

chants and traders, though they do not go beyond sea *f*.

And *per Coke*: There are four sorts of merchants, *viz.* adventurers, dormant, travelling, and resident; and neither of them shall take by survivorship *g*.

Therefore it has been held that the executor of the deceased shall join with the surviving merchant for goods carried away in the life-time of the testator *h*. *Dub.* whether necessary? For the remedy survives, though the duty does not survive *i*. And though there is no survivorship between merchants, yet if there are two joint merchants, or two who are jointly possessed of goods in the way of trade, who casually lose them, and afterwards one of them dies, the survivor alone may, it seems, bring trover for them, for the action must necessarily survive, though the interest doth not, otherwise there would be a failure of justice; because the survivor and

f 2 Brownl. 99.

g 20 Vin. Abr. tit. Survivorship. D. 2 Brownl. 99. in *nota* there.

h Lutw. 1493.

i Show. 189. Salk. 444.

the executor of him who is dead cannot join in the action, for their rights are of several natures, and there must be several judgments; but it being held clearly, that if this was any plea, it must have been in abatement, for which reason the books say *k*, the principal point was not determined.

If where there are two joint traders, and one dies, and the survivor carries on the trade after the death of the partner, the survivor shall answer for the gain made by this trade. *Per Lord Keeper Harcourt, East. 1711. Brown v. Litton*¹.

In this case the plaintiff's testator was captain of a ship, and being on his voyage beyond sea, had 800 dollars on board the ship, which he intended to invest in trade; the captain died, and the defendant (who was mate of the ship, becoming captain, took these 800 dollars, and investing them in trade, made great improvements thereof; but on his return to *England*, the executrix of the first captain brings a bill against him for an account.

k Carth. 170—1. Kemp & Andrews. 1 Show. 188. Comb. 474. 3 Lev. 290. S. C.

¹ 1 P. Will. 141. 10 Mod. 20. 2 Eq. Ca. Abr. 5. pl. 5. 722. pl. 2. S. P.

The

The defendant admitted the receipt of the money, and offered to re-pay the same with interest; whereas the plaintiff insisted on the profits produced in trade, and the several investments that had been made therewith.

Objection.—The defendant having traded with this money, it was at his risk and peril; and as, had it been lost in trade, the defendant must have borne that loss; so it is reasonable, on the other hand, that the profit which has been made of it should belong to him; as where an executor puts out money without the decree of the Court, if this be lost, it is at his peril, and therefore he ought to have the interest.

Lord Keeper said, that he took the defendant, in this case, to be more like a trustee than an executor, and if so, he ought clearly to account for the profits made of the money; that the primary intent in carrying abroad his money was, to invest it in trade, and not to return with it home again; and therefore, the defendant having observed the intent of the testator in trading therewith, and having taken such a prudent care in the management of it, as (it might be presumed he would have taken of his own money) his
Lordship

Lordship apprehended the defendant would not have been liable to answer for any loss that might have happened; and compared it to the case of two joint traders, where, if one dies, and the survivor carries on the trade after the death of the partner, the survivor shall answer for the gain made by this trade.

The Court observed, that this being an island, all imaginable encouragement ought to be given to trade, and such construction was for the benefit of him who carried out this money with that intent; and there was no reason that his death should so far injure his family and relations, as to deprive them of the benefit which might accrue from it in the way of trade. But that, to recompence the defendant for his care in trading with it, the Master should settle a proper salary for the pains and trouble he had been at in the management thereof; and in the mean time costs to be reserved m.

The distinction made between joint-tenants and co-partners in respect of survivorship by the laws of *England* is, that survivorship re-

^m Reg. Lib. A. 1710. fol. 660.

gularly takes place in jointenancy, unless there is a special agreement to the contrary, but not in a partnership amongst merchantsⁿ. And Courts of Law will take notice of the *lex mercatoria* without its being specially pleaded with respect to this general custom.

For in the case of *Bellasis v. Hester*^o, *Powell* Justice said, "That the Court would take notice of the *lex mercatoria*, as that there is no survivorship."

And in articles of co-partnership between merchants it is not necessary to provide against survivorship.

Thus in the case of *Jeffereys v. Small*^p, *Lord Keeper* said, "The custom of merchants is extended to all traders, to exclude survivorship."

And in a cause for an account of a co-partnership, *both* partners being dead, a receiver shall be appointed^q.

ⁿ 1 Inst. 182. a.

^o 1 Ld. Raym. 281.

^p 1 Vern. 217.

^q 2 Brown. 172.

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A P P E N D I X.

[No. 1.]

Articles of Copartnership,

For carrying on a Joint Trade.

(*Common Form.*)

AR T I C L E S of agreement indented, &c. between *A. B.* of — of the one part, and *C. D.* of — of the other part.

First, The said *A. B.* and *C. D.* HAVE joined, and by these presents DO join themselves to be copartners together in the art or trade of — and all things thereto belonging; and also in buying, selling, vending and retailing all sorts of wares, goods and commodities belonging to the said trade of — which said copartnership is to continue from — for and during, and unto the full end and term of — from thence next ensuing, and fully to be compleat and ended. AND to that end and purpose, he the said *A. B.* hath, the day of the date of these presents, delivered in as stock the sum of — and the said *C. D.* the sum of — to be used, laid out and employed in common between them, for the management of the said trade of — to their mutual benefit and advantage. AND it is agreed between the said parties to these presents, and the said copartners each for himself respectively, and for his own particular part, and for his executors and administrators, BOTH severally and not jointly covenant, promise and agree, to and with the other partner, his executors and administrators, by these presents, in manner and form following (that is to say) That they the said copartners shall not nor will at any time hereafter use, exercise or follow the trade of — aforesaid, or any other trade what-

Parties join in copartnership for years.

Each has delivered in money, as stock, to be laid out, &c.

Not to use their trade for private benefit,

soever,

foever, during the said term, to their private benefit or advantage, but shall and will from time to time, and at all times during the said term (if they shall so long live) do their and each of their best endeavours in and by all means possible to the utmost of their skill, power and cunning, for their joint interest, profit, benefit and advantage, and truly employ, buy, sell and merchandize with the stock aforesaid, and the increase thereof, in the trade of — aforesaid, without any sinister intentions or fraudulent endeavours whatsoever. AND ALSO that they the said copartners shall and will from time to time, and at all times hereafter during the said term, pay, bear and discharge equally between them the rent of the shop which they the said copartners shall rent or hire for the joint exercising or managing the trade aforesaid. AND that all such gain, profit and increase that shall come, grow or arise for or by reason of the said trade, and joint occupying as aforesaid, shall be from time to time during the said term equally and proportionably divided between them the said copartners, share and share alike. AND ALSO that all such loss as shall happen to the said joint trade by bad debts, ill commodities, or otherwise, without fraud or covin, shall be paid and borne equally and proportionably between them. AND FURTHER it is agreed by and between the said copartners, parties to these presents, that there shall be had and kept from time to time, and at all times during the said term, and joint occupying and copartnership together as aforesaid, perfect, just and true books of account, wherein each of the said copartners shall duly enter and set down, as well all money by them received, paid, expended and laid out in and about the management of the said trade, as also all wares, goods, commodities and merchandizes by them or either of them bought and sold, by reason, or means, or upon account of the said copartnership, and all other matters and things whatsoever, to the said joint trade, and the management thereof, in any wise belonging or appertaining;

but for their
joint interest.

Shop rent,

Gain.

Losses.

Books of
account.

taining; which said books shall be used in common between the said copartners, so that either of them may have access thereto without any interruption of the other. AND ALSO that they the said copartners, once in three months or oftener if need shall require, upon the reasonable request of one of them, shall make, yield and render each to the other, or to the executors of each other, a true, just and perfect account of all profits and increase by them or either of them made; and of all losses by them or either of them sustained; and also of all payments, receipts, disbursements, and all other things whatsoever by them made, received, disbursed, acted, done, or suffered in their said co-partnership and joint-occupying as aforesaid, and the same account so made, shall and will clear, adjust, pay and deliver each unto the other at the time of making such account their equal shares of the profits so made as aforesaid. AND at the end of the term of — or other sooner determination of these presents (be it by the death of one of the said copartners or otherwise), they the said co-partners each to the other, or in case of the death of either of them the surviving party to the executors or administrators of the party deceased, shall and will make a true, just and final account of all things as aforesaid, and divide the profits aforesaid, and in all things well and truly adjust the same, and that they also upon the making of such a final account and all and every the stock and stocks as well as the gains and increase thereof which shall appear to be remaining, whether consisting of money, wares, debts, &c. shall be equally divided between them the said co-partners, their executors or administrators, share and share alike. *In witness, &c.*

Settling accounts during the partnership,

and at the end thereof division of stock.

A P P E N D I X.

[No. 2.]

Articles of Co-partnership

Between two Bankers, where one fixed in Business admits the other to be Partner, and to have one fourth of the Profits.

A. B. possessed of a house and shop exercises the trade,

ARTICLES of Agreement indented, &c. between *A. B.* of *L.* Banker, of the one Part, and *C. D.* of *M.* Goldsmith, of the other Part.

is desirous to ease himself and is willing to accept *C. D.* a partner.

Whereas the said *A. B.* is possessed of a house and shop situate in — for several years yet to come, AND WHEREAS the said *A. B.* hath for several years now last past used and exercised, and doth now use and exercise in the said shop the trade of a goldsmith or banker, in selling plate, receiving and keeping several persons' money and giving out bills and notes for the same, and issuing and paying thereof to the said persons or their orders. AND the said *A. B.* having a desire as well to ease himself of the trouble of the attendance and management of the whole business of the said trade, as for the affection he hath and beareth to the said *C. D.* he the said *A. B.* is willing to accept and take the said *C. D.* to be partner with him in the said trade as to such part of the benefit and advantage thereof, and on such terms and conditions as are herein after agreed for the furnishing, managing and carrying on the said intended joint trade. AND for that purpose it is agreed that a joint stock of 6000*l.* in money shall be advanced and made up between them the said *A. B.* and *C. D.* (to wit) by the said *A. B.* three-fourth parts thereof, and by the said *C. D.* the other one fourth part thereof, of which said stock the said *A. B.* hath accordingly advanced and paid the full sum of 4500*l.* and the said *C. D.* the sum of 1500*l.* being the sum of 6000*l.* agreed on to carry on the said trade.

Stock.

A P P E N D I X.

trade. AND in regard some disputes may arise relating to the present debts and credits of the said trade now managed by the said *A. B.* it is agreed that the schedule hereunto annexed (intituled the debts and credits of the within-named *A. B.*) shall be accepted by the said parties, and the neat balance of the said account in the schedule mentioned shall be taken as part of the money to be advanced by the said *A. B.* NOW THESE PRESENTS WITNESS that the said *A. B.* for the cause aforesaid, and for the trust and confidence he hath and reposeth in the said *C. D.* HATH admitted and accepted, and by these presents BOTH admit and accept, the said *C. D.* to be partner with him in the trade aforesaid, and the said *A. B.* and *C. D.* are to become partners in the trade of a goldsmith or banker, to be used, exercised and carried on in the shop aforesaid, on the joint stock aforesaid, for the term of seven years, to commence and begin from the — day of — now last past before the date of these presents. Nevertheless under the limitations, and according to, and upon the covenants, grants, clauses, provisoes, conditions and agreements herein-after in these presents mentioned, expressed and declared. AND IT IS AGREED by and between the said parties to these presents, that the said *A. B.* his executors, administrators and assigns, shall during the said copartnership, be paid and allowed out of the joint stock of the said trade, in consideration of and for the use of the said shop the yearly rent of 10*l.* to be deducted and paid out of the said joint stock by even and equal portions. AND ALSO the said *A. B.* is to be allowed and paid out of the said joint stock one fourth part of all journeymens' wages, and one fourth part of their diet and lodging. AND IT IS AGREED by and between the said parties to these presents, that the said *A. B.* his executors, administrators and assigns shall have, receive and enjoy to his and their own proper use and uses three full one fourth parts (the whole into four equal parts to be divided) of all the clear and

A. B.'s
debts and
credits.

A. B. ad-
mits *C. D.*
a partner.

Agreement
as to rent.

Servants'
wages.

Diet and
lodging.

Shares in
the profits.

net profits, produce, benefit and advantage which from time to time during the said co-partnership shall arise, accrue, or be made or gotten by the management of the said joint trade, or the increase or improvement of the joint stock thereof, and that the said *C. D.* his executors, administrators and assigns, shall have, receive, and enjoy to his and their own proper use and uses, one full fourth part of the said produce, profit, benefit and advantage which from time to time during the continuance of the said co-partnership shall arise, accrue, or be made or gotten by the management of the said joint trade, or the increase or improvement of the said joint stock thereof. AND the said *C. D.* for himself, his executors and administrators, doth covenant, promise and grant, to and with the said *A. B.* his executors and administrators by these presents, that he the said *C. D.* shall and will from time to time, during the said co-partnership, use his utmost endeavours, care and diligence to manage the affairs of the said joint trade, and to increase and improve the said joint stock thereof to the best advantage. AND IT IS AGREED by and between the said parties to these presents, that all such monies belonging to the said joint stock and trade, and the increase and produce of the said joint stock as shall be received by either of the said parties to these presents, during the continuance of the said partnership, shall from time to time be paid and brought into the said joint stock. AND that all taxes, parish duties, payments, impositions, used in carrying on the said trade, and all debts, losses by bad debts, and charges whatsoever, which shall arise or be contracted, made or owing, or grown and become due, to be paid by reason of the said joint trade or the management thereof, shall be, during the said partnership, borne, paid, sustained, and defrayed out of the said joint stock, and be deducted and satisfied before any dividend according to the said parties interest therein, (that is to say) three parts thereof by the said *A. B.* and one fourth thereof by the said *C. D.*

Covenant
that he who
is taken into
co-partner-
ship shall do
his endea-
vours in
managing
the joint
trade.

Agreement
as to the
joint stock
and pro-
duce.

Taxes, pay-
ments,
servants'
wages,
debts, losses,
&c.

C. D. AND FURTHER that neither of the said parties, without the consent of the other of them first had in writing, shall become bound or bail for any person whatsoever during the said partnership. AND FURTHER that the said *C. D.* shall not, without the consent of the said *A. B.* first had and obtained in writing, lend to any person any sum exceeding 50*l.* AND IT IS FURTHER AGREED by and between the parties to these presents, that all and every the books of account touching the said joint trade shall be kept in the said shop, and that once in every year (to wit) some time in the month of — during the continuance of the said partnership, a general, full and perfect account shall be stated, adjusted, and made up between the said parties to these presents, of all matters and things touching the said partnership, and after the same shall be made up, adjusted, and fairly entered in books for that purpose and signed by the said parties, duplicates shall be then also made and signed by the said parties, and one part thereof delivered to each of them, which duplicate shall contain a full account of the stock, debts and credits of the said partnership. AND IT IS AGREED that after the said annual account is made up, each of the said parties shall and may deduct and take out of the profits, neat produce, and increase of the said trade, to and for his own particular use, such sum and sums of money as shall be mutually agreed upon by and between the said parties to these presents. AND it is hereby further agreed that no advantage of survivorship shall be taken by the said parties, but that on the death of either of them, the executors or administrators of the party so dying, giving security to the survivor to indemnify him, shall and may receive the share or interest in the said joint stock of the party so dying. PROVIDED ALWAYS and it is hereby declared by and between, &c. that the said *C. D.* shall not at any time hereafter during the continuance of this present partnership, or by virtue thereof, have any power, liberty or authority to (nor shall

Being bound
in bail for
other persons.

Lending
money.

Account
books and
accounts.

Money de-
ducted for
the particu-
lar use of
each party.

Survivor-
ship.

Proviso as
to turning
away ser-
vants.

in any wise) turn away any journeyman or servant employed, or hereafter to be employed, in the joint trade, without the consent of the said *A. B.* in writing first had and obtained. PROVIDED FURTHER, and it is consented and agreed to by the said *C. D.* that if the said *A. B.* shall be desirous and minded to determine and dissolve this present partnership, (which is however in all events to continue for the space of two years from the — day of — afore-said) that then, and in such case, it shall and may be lawful to and for the said *A. B.* at the end of the said two years, and upon his giving first a year's notice in writing to the said *C. D.* to determine and make void this present partnership; and that on that day 12 months after such notice given to the said *C. D.* the said partnership and joint trade shall cease, determine and be utterly void, and of no effect, any thing, &c. AND LASTLY, it is hereby declared and agreed by and between the said parties to these presents, that at the end of the said partnership (either by effluxion of time, or by such notice given to the said *C. D.* by the said *A. B.* pursuant to the proviso above written) a just and fair account shall be taken and made up between the said parties of the said joint stock of 6000*l.* and the produce, profits and proceeds thereof, and of all other matters and things relating to the said joint stock and trade, and of all losses, bad debts, charges and deductions; and the neat and clear produce of the said joint stock and trade shall be divided into four equal parts or shares, 3-4th parts whereof shall belong to, be had, received and disposed of by the said *A. B.* and the remainder 1-4th part by the said *C. D.* AND ALSO that the said parties shall then give each other such releases, and enter into such bonds for each other's mutual indemnity, and take such measures by letter of attorney to get in the debts standing out, and execute such other deeds and other agreements, and do such other acts as are usual and reasonable between partners, on the determination of a copartnership. IN WITNESS, &c.

Agreement
as to ending
partnership.

Proviso to
end the part-
nership on
notice.

[No. 3.]

Articles of Copartnership

Between three Sisters, to carry on the Business
of Milliners.

THIS Indenture tripartite, made, &c. between
E. C. of——of the 1st part, *M. C.* of——of the
 2d part, and *S. C.* of——of the 3d part, WITNESSETH
 that the said *E. C. M. C.* and *S. C.* for the mutual ^{That for the}
 love and affection they have and bear to each other, ^{mutual love}
 and having had experience of each others care and ^{and confi-}
 fidelity, and in confidence thereof for the future, ^{dence.}
 and the better to improve their respective estates,
 HAVE agreed, and by these presents DO agree to ^{Agree to be}
 become copartners in the art or business of milliners, ^{copartners.}
 for the term of 7 years, to commence from
 —— (if the said parties shall so long live,) with
 the joint stock of 600*l.* to be raised and brought in ^{Stock.}
 manner following, and to be managed and carried on
 for their mutual benefit and advantage, at their own
 dwelling house in —— AND for that end and purpose, ^{Covenant}
 IT IS MUTUALLY COVENANTED, consented to and ^{that house-}
 agreed by and between the said parties to these pre- ^{hold goods}
 sents, that the several household goods, wares and ^{and wares be}
 merchandizes mentioned and comprised in the in- ^{valued at.}
 ventory, &c. shall be valued and reckoned at the said
 sum of 600 *l.* and shall be by them allowed, deemed
 and taken as so much money, being the whole money
 intended to be the said joint stock. AND that they ^{To be just}
 the said *E. C. M. C.* and *S. C.* shall and will be just, ^{and true to}
 true and faithful each to the other, in all buyings, sell- ^{each other.}
 ings, accounts, reckonings and dealings together,
 concerning the said copartnership, and shall and will
 mutually endeavour by all JUST care and diligence, to
 advance and promote the said joint trade and stock, ^{Pay rent.}
 with-

A P P E N D I X.

Charges of
housekeep-
ing, servants
wages and
taxes equally
between
them.

And bear
losses and
expences.

Books of
accounts to
be kept.

without fraud or collusion. AND they shall equally bear and allow each an equal share and proportion, for or in respect of the rent of the house they now dwell in, and of such yearly rent of any other house or lodging, which they shall hereafter think fit to take or rent during the said copartnership; and of all charges of housekeeping, servants wages, and parish rates and duties, and of all taxes and assessments whatsoever, which shall be rated or assessed on them the said *E. C. M. C.* and *S. C.* or any or either of them in respect of their said house or lodgings, trade or employment, during their said copartnership. AND ALSO of all losses, costs and expences which shall at any time happen, or be occasioned by or by means or in respect of the said joint trade during the said copartnership, (subject nevertheless to the provisos and agreements herein after mentioned,) without each others neglect or wilful default, which shall be from time to time paid and sustained out of the said joint-stock, or the proceeds arising thereby. AND that during the said copartnership, one or more book or books of account shall be kept, at the place where the said trade or employment shall be carried on and managed, wherein entries shall be made of all such ready monies or goods as shall be brought into or employed in the said joint stock, and of all goods by them bought or sold on account of the said joint trade, and of all debts by them contracted in relation to the said copartnership, and an account shall be likewise taken in writing of all ready money by them received in their said way of trade, and of all goods by them sold upon credit; and entries shall be made of parties' names, to whom such goods were sold, and at what rate or price, and also of what sum or sums of money shall be from time to time taken out, by the said copartners, or either of them, or their order, for defraying the expences of their family and servants, or in any otherwise relating to the said copartnership; which said books the said copartners, and their respective executors and administrators shall freely,

ly, and at all convenient times, as well during the continuance as after the expiration of the said copartnership, have liberty to resort to, inspect and peruse when and as often as occasion shall require. AND it is further agreed by and between the said parties to these presents that the said copartners shall upon such occasions have liberty to transcribe a copy of all, or any part of the account therein mentioned, without the let, hindrance or denial of each other. AND that all bonds, bills, notes, specialties, or other securities taken by the said copartners, or either of them, for any debt or debts contracted on account of the said joint trade or employment, shall be made and taken in the names of all and every the said copartners, and for their joint use and benefit; and be by them deposited in some convenient place, where the said trade shall be carried on and managed, to which either of the said copartners shall have a liberty to resort as occasion shall require. AND that it shall and may be lawful, to and for the said *E. C. M. C.* and *S. C.* or either of them, with the approbation of each other of them, and not otherwise, to have and take in turns, one or more apprentice or apprentices, or covenant servant, to be employed in and about the business of the said joint trade, taking good security for the fidelity of such apprentice or apprentices, or covenant servant, and for their good demeanour during their continuance in the said employment, so as such apprentice, apprentices or covenant servants shall be at the command of all and every of the said copartners. AND that all monies to be had and taken with any such apprentice or apprentices, or covenant servant, shall be brought into the said joint stock, and employed during the continuance in the said copartnership, for the mutual benefit of the said copartners, and then to be accounted for and answered to the party to whom such apprentice shall be bound. AND if such apprentice or covenant servant shall imbezil, waste, purloin and spoil any of the said goods belonging to the said copart-

And copies thereof may be made.

Bonds notes, &c. to be taken in all their names.

Of taking apprentices and servants.

Monies taken with apprentices, &c.

Imbeilment by apprentices.

One not to
trust to above
5*l*. without
the others
consent.

Of releasing
and com-
pounding for
debts.

Of being su-
rety or bail.

To account
once a year.

nership, and the security taken for the fidelity of such apprentice or servant, shall not be responsible to answer the damages or loss which shall happen thereby, that then such loss or damage shall be sustained and borne out of the said joint stock, or the proceeds arising thereby. AND it is further agreed by and between the said parties to these presents, that neither of them the said *E. C. M. C.* and *S. C.* shall not at any time or times hereafter, during the continuance of the said copartnership, sell or deliver out upon trust, and without ready money, any of the goods employed in the said joint trade, to the value of 5*l*. or upwards, or trust out, or lend any money out of the said stock above the value aforesaid, to any person or persons whatsoever, without the consent of each other, nor without each others consent, release or discharge any debt or sum of money, which shall be due or owing to them on their joint account, or any part thereof, or any security given for the same; but only such, and so much as shall be actually received, and brought into the joint stock; nor compound or agree to accept part for the whole of any debt or sum of money to them jointly, owing or payable, without the consent and approbation of the other of them thereto, in writing first had and obtained. AND that neither of the said copartners shall at any time during the continuance of this copartnership, and before a final partition made between them, become bound, bail or surety for, with, or to any person or persons whatsoever, either by bond or bill, promise or otherwise, without the privity or consent of the other of them thereto in writing first had and obtained. AND it is further agreed by and between them the said *E. C. M. C.* and *S. C.* that they shall once in every year yearly, during the said copartnership, at the feast of — or within twenty days then next ensuing come to a fair, plain and perfect account and reckoning with each other, of, for and concerning all matters relating to the said copartnership, [*or say*, all their buyings, sellings,

sellings, tradings and dealings for, upon, or by reason of their joint account, and relating to their said copartnership, and of every such stocks, ready money and things as concern, or then shall be employed in and about the same, and of the gains, profits and increase thereof; and also of the charge, damage, losses, and expences happening or accruing thereby, and likewise of all debts owing to and by the said copartners, for, upon, or in respect of their said joint trade and dealing] to the intent it may appear how and in what state and condition they then stand in reference to their said copartnership and joint stock; and that upon the finishing and perfecting of every such account, the same shall be fairly written and entered in three several books for that purpose to be provided, all three of which said books shall be subscribed by the said *E. C. M. C.* and *S. C.* and one of them so subscribed shall remain with the said *E. C.* and one of them so subscribed shall remain with the said *M. C.* and the other of them so subscribed shall remain with the said *S. C.* which said accounts so passed and subscribed shall not be called in question or controverted, unless some special error or mistake shall evidently and plainly appear to have therein escaped notice, and that the same error shall be certified in the life-time of all the said copartners, and not otherwise. AND ALSO that within forty days next, after the expiration of the said copartnership, a true and general account shall be made of all their dealings on account of their joint stock, and a just and equal partition shall be thereof made. PROVIDED ALWAYS, and it is expressly agreed by and between the said parties to these presents, that if either of them the said *E. C. M. C.* and *S. C.* shall happen to die before the expiration of the said term of seven years, or sooner determination of this present copartnership, and before a final account or partition shall be passed and made between them, of all matters and things relating to the said copartnership, no benefit or advantage of survivorship shall accrue unto, or be taken by the other of them, in any wise whatsoever;

but

And to account with-
in 40 days,
&c.

Provido that
if one of the
copartners
die, no sur-
vivorship
shall accrue,
but an ac-
count shall
be taken by
indifferent
persons, and
the survivors
shall either
take the

whole stock at an appraisement, paying the executors or administrators of the deceased, one third of the value, or permit them to dispose of one third of the stock.

Covenant for performance of covenants.

Any one of the copartners may dissolve the copartnership on giving 6 months notice, and paying 50l.

Proviso, that a copartner marrying shall quit the copartnership within one year after, and pay to the others 50l.

but in such case a true and just account shall be taken by three indifferent persons, one to be chosen by each of the survivors of the said copartners, and the other by the executors or administrators of the party so dying; and the survivors of them the said *E. C. M. C.* and *S. C.* shall have their election, either to take the whole stock and produce thereof, at the rates the same shall be appraised at, paying one third part of the value, at which the same shall be appraised, unto the executors or administrators of the party so dying within six months after such copartner's death, or permit and suffer the executor or administrator of the party so dying to dispose of the said one third part of the said stock and produce thereof at their own will and pleasure. AND the said *E. C.* for herself, her executors and administrators, doth covenant, promise and agree to and with the said *M. C.* and *S. C.* their executors and administrators by these presents, that she the said *E. C.* her executors and administrators shall and will, well and truly perform and keep, all and singular the covenants, provisoes and agreements herein before mentioned, on her and their parts and behalves to be performed and kept, according to the intent and true meaning of these presents. AND, &c. [*the like covenants from M. C. to E. C. and S. C. and from S. C. to E. C. and M. C.*] AND it is mutually agreed by and between the said parties, that in case either of them, the said *E. C. M. C.* and *S. C.* shall at any time during the said term of seven years, be minded to break off and dissolve the said copartnership, they shall either of them be at liberty so to do, on giving six months notice to the others of them, of such her intention to dissolve the same, and the party giving such notice, paying the others of them 50l. out of her third part of the said joint stock and produce thereof, as the same shall be appraised at. PROVIDED ALWAYS, &c. (*that if one of the copartners marry, she shall quit the copartnership.*—See title PROVISIO.) PROVIDED ALWAYS, and it is hereby declared and agreed by and between all the said parties to these presents, that if either of them the said *E. C.*

E. C. M. C. and *S. C.* shall marry within the term of seven years, that then the said party so marrying, shall quit the said trade and stock, and leave the same (being valued in such manner as herein before mentioned, in case of the death of either of the said parties) to the other of them, who shall pay for the said stock, and produce thereof, unto the party so marrying, what the same shall be valued at, within the space of one year after such marriage shall be had, by four equal quarterly payments; the party so marrying allowing to the other of them the sum of 50*l.* out of her third part of the said joint stock and produce thereof, as the same shall be appraised at, as if she had broke off the said copartnership in such manner as aforementioned. AND it is hereby agreed and declared by and between the said parties hereto, that if either of them the said *E. C. M. C.* or *S. C.* shall be minded to enlarge the time of this present copartnership beyond the said term of seven years, then such one of them shall give notice to the other of them, of such their intention, six months before the expiration of the said term of seven years, or in default thereof, this present copartnership shall cease and determine at the end of the said term of seven years. IN WITNESS,

What notice
required on
enlarging
copartner-
ship.

[No. 4.]

Agreement of Copartnership

Between two Brewers.

THIS indenture, &c. between *T. T.* of — of the one part, and *W. P.* of — of the other part, WITNESSETH, that the said *T. T.* and *W. P.* having had experience of each others fidelity and care, and in confidence thereof, for the future and the better in probability to augment their respective estates, have agreed upon a copartnership and joint trade; and therefore

Agreement
to the co-
partnership.

Covenant
for the same.

Where.

For what
time.

Stock.

therefore each of them for himself respectively, and for his several and respective executors and administrators, doth covenant, promise and agree to and with the other of them, his executors and administrators, by these presents, that from and after the day of the date of these presents, they the said *T. T.* and *W. P.* shall and will be and continue copartners and joint traders in the art, trade, mystery and business of a brewer, at and in a messuage, &c. situate, &c. called, &c. now in the possession of the said *T. T.* and *W. P.* together with all, &c. thereunto appertaining, mentioned, or expressed in one or more book or books, inventory or inventories signed by both the said parties to their presents, and witnessed by the witnesses to these presents, on the day of the date hereof, for and during the time and term of — years from the day of the date of these presents, fully to be completed and ended (if both the said parties to these presents shall so long live). AND for the fair, equal, and better carrying on the said intended copartnership and joint trade in the said brewhouse, it is declared and agreed by these presents, by and between the said *T. T.* and *W. P.* that the said *T. T.* for his part and proportion, now hath in stock for the said trade in ready money, debts, goods, utensils, and implements fit for the said intended joint trade, to the full value of 1000*l.* and the said *W. P.* likewise for his part, &c. (as before) both which said sums together amount to the sum of 2000*l.* which is to remain as joint stock, and to be employed and used in and about the said trade of brewing, selling and uttering of ale and beer in the said brewhouse, for and during the said term of — as aforesaid. AND for the more orderly proceeding in, and carrying on the said intended trade and business, it is mutually covenanted, concluded, and agreed by and between the said parties to these presents, and each of them the said *T. T.* and *W. P.* doth for himself respectively, and for his several and respective executors and administrators, covenant, promise and grant

grant to and with the other of them, his executors and administrators, by these presents, in manner and form following (to wit), that, &c. (to be true to each other). See p. ix. AND that each of them the said T. T. and W. P. and their several executors and administrators shall have the full interest, right, title and property of, in and to one moiety, or half part of the said joint stock of 2000*l.* and of and in one moiety or half part of all gains, profits and increase which shall arise, happen, accrue, or be made thereby; and also shall equally bear, pay and allow costs, losses, &c. [See p. x. *mutatis mutandis*], other than such as herein after are particularly expressed and agreed to the contrary. AND that the said joint stock, and also all the buyings, sellings, and dealings, gains, debts, and credits which shall grow, arise, happen, or be made of, or by reason or means of the said copartnership, or joint trade, credit, or dealing, or any thing incident or belonging thereto, shall from time to time, during all the term of this copartnership, be truly entered and fairly written in some convenient and fitting book or books for that purpose, to be provided and kept at the house where the said trade is to be carried on in such manner as men of the like trade use or ought to do; which said books the said copartners and their respective executors and administrators shall freely, and at all times, as well after, as during the continuance of this copartnership, have the right and perusal, when and as often as it shall be desired, and shall have liberty to transcribe, &c. [See p. xi.] AND that all bonds, bills, notes, specialties, and securities whatsoever, at any time made or taken for any matter or thing concerning their joint stock or trade, shall be made and taken in the names of both the said copartners, and for their joint and equal use and benefit. AND that all notes and other securities to be given to any person or persons who shall intrust the said partners with goods or other things upon account of the said trade, shall be made

Covenant to be true to each other.

Each of them to have a moiety of the stock and gains, and bear and pay his share of losses and expences.

Books of accounts to be kept,

which the copartners may see and take copies of.

Bonds and notes to be taken in both their names.

The like of notes, &c. given.

made and given by and in the names of them both AND ALSO that it shall and may be lawful to and for each of the said copartners weekly (to wit) on *Monday* in every week during the said copartnership, to have and take out of the said joint stock for their respective uses and occasions the sum of 20*s.* each. AND that neither of them the said copartners shall at any time, without the consent of the other of them release, &c. [See p. xii.] AND, &c. *neither to be bail, &c. without the other's consent. A general account to be stated once a year, entered in books and transcripts to be made, &c.* [See p. xii.]

Proviso that if one partner dies, no benefit shall be taken by the survivor.

PROVIDED ALWAYS, and it is expressly declared, conditioned and concluded by and between the said parties to these presents, and the true intent and meaning of the said parties hereunto and of these presents is, that if either of the said parties to these presents shall happen to depart this life before the said term of — years intended for this copartnership shall in course of time run out and be expired, and before a final account and partition shall be made and passed between them, of all matters and things relating to their said joint trade and copartnership, yet nevertheless no benefit or advantage of survivorthip shall accrue unto, or be had and taken by the other of them in any wise whatsoever, any law, usage or custom, or any thing herein contained to the contrary notwithstanding. AND IT IS ALSO PROVIDED, conditioned and agreed by and between the said parties to these presents, and each of them doth hereby for himself respectively, and for his several and respective executors and administrators, covenant, promise and grant, to and with the other of them, his executors and administrators, by these presents, that if the said *T. T.* shall happen to depart this life before the expiration of this copartnership, and *T. T.* jun. son of the said *T. T.* party to these presents, shall be minded and willing to enter into and become a partner with the said *W. P.* in this present copartnership, that he the said *W. P.* shall admit the said *T. T.* jun. into this copartnership, under the conditions, covenants

If one of the copartners in particular dies, and his son is willing to become a copartner, the other shall admit him;

venants and agreements herein before, and herein after mentioned and contained, touching the said copartnership; but if the said T. T. jun. shall decline or refuse to come into the said copartnership, then the surviving partner, his executors and administrators, shall and will truly pay, or cause to be paid unto the executors or administrators of the party so dying, the moiety or half part of the joint stock, and of all such produce, profit and increase as shall appear to be justly due and coming to such of the said partners so dying, at the time of the last yearly stating accounts, together with interest for the same, at the rate of 5 l. *per cent. per annum*, to be accounted from such said last yearly stating of accounts, it being the intent of the parties to these presents, that the party so dying shall not be entitled or liable to the profit or loss in trade from the time of the last stating of accounts to the time of their death, in manner as follows, (to wit) one moiety or half part thereof at the end of six months after the decease of such of the said copartners, and the other moiety or half part thereof at the end of 12 months next after such decease. AND that the surviving partner, his executor or administrator, shall have, take and enjoy to his and their own use and behoof, the other moiety or half part of the said joint stock, and of all such profit, produce or increase as shall appear to be justly due and coming to such surviving partner; and also of all goods, wares, debts, ready money, and things then within the said copartnership, without rendering an account thereof to the executor or administrator of the said deceased copartner. AND if any debt shall be owing by the said copartners in the said copartnership or joint trade, such surviving partner shall pay and satisfy the same within six months next after such decease, or so soon as such debts shall become due; and thereof, and therefrom, and of and from every part thereof, shall at all times thereafter save and keep harmless the heirs, executors and administrators of the said deceased partner, and for securing the several pay-

but if the
son refuses,
the deceased's moiety
to be paid to
his execu-
tors with in-
terest;

and the sur-
viving part-
ner to have
the other
moiety.

Surviving
partner to
pay the debts
owing by
them,

and indem-
nify the ex-
ecutors, &c.
from the
same,

and give security to the executors, &c. of the deceased for their moiety.

Such executors, &c. to release their right to the stock, &c.

Accounts to be passed within 20 days after co-partnership ended.

ments herein before mentioned to the executors or administrator of such partner so dying as aforesaid, the said surviving partner shall within 30 days next after such decease enter into and become bound in and by several bonds or obligations of usual penalties to the executors or administrators of the deceased partner for the payment of the same accordingly; upon sealing and executing of which said bonds, and securing the said executors or administrators of the deceased partner of and from the joint stock, debts owing, and payable by the said co-partners on their joint account at the time of their last settling accounts before such death, the said executors or administrators shall and will release, assign and quit claim to the said surviving partner, all their right, title, interest, claim and demand, of, in, and to the said partible stock and estate, and all matters and things thereunto belonging. AND that upon the expiration of the said term of — hereupon agreed upon for the continuance of this co-partnership, or within twenty days then next ensuing, a final account, partition and division shall be made and passed by and between the said co-partners, of, for, and concerning all such goods, wares, ready money, debts, and other matters and things as shall be then due, owing, or belonging unto the said joint stock and trade, or to the said co-partners in respect thereof, or in any wise relating thereto, and also of and for all such debts, dues and sums of money as by reason of their joint trade shall be contracted, or be by them owing to any person or persons, and likewise of and for all the gains and increase, damages and losses happening or accruing by, through, or in respect of the said partible trade and co-partners, so that the true state thereof may appear, and what and how much thereof shall then belong to each party, and then and thereupon, and after all debts and sums of money owing on the account of, or by virtue of the said co-partnership shall be paid, each of them the said T. T. and

W. P.

W. P. and each of their executors and administrators shall have and take to his and their own proper use and benefit, one moiety or half part, (the whole into two equal parts to be divided) of all things then in stock between them. AND as for the debts which shall then be due and owing on their joint account, they the said *T. T.* and *W. P.* shall, as equal as may be, divide and part the same into two several shares or lots, and the debts which by such lot shall fall out to either of the said copartners, his executors or administrators, together with the securities concerning the same, shall be assigned and set over to him or them by the other of the said copartners, his executors or administrators, and he or they shall be fully empowered to receive the same to his or their own use and benefit, without any let or hindrance, of or by the other of them, his executors or administrators, and that according to the true intent and meaning of these presents. AND that neither of them the said *T. T.* and *W. P.* shall or will at any time or times during the said copartnership, exercise or carry on, either separately or in copartnership, with any other person or persons, the said mystery or trade of a brewer in any manner whatsoever. AND LASTLY, it is mutually covenanted, concluded, and agreed, by and between the said parties to these presents, for themselves, their executors and administrators, that if any doubt, question, controversy or difference shall happen or arise between the said parties, concerning the said copartnership, the same shall be referred to two indifferent persons, being master brewers, to be nominated by the said copartners within 7 days next after such difference shall arise or happen, (each of the said copartners to chuse one) to be by them heard and determined, or else by an umpire to be nominated and appointed by the said two indifferent persons, in case they themselves cannot agree and settle the same, and that each of the said copartners, his respective executors and administrators, shall and will stand to,

Debts stand-
ing out to
be divided
and assigned.

That nei-
ther partner
shall follow
the said trade
with any o-
ther person.

Differences
to be left to
arbitration.

When arbitration to be made.

No action to be brought before reference to arbitration.

abide, perform and keep such order and determination therein, as the said two indifferent persons, or the said umpire so to be chosen as aforesaid, shall make and give between the said referees, so as the same be rendered and given under the hands and seals of such person or persons, within twenty days next after such difference shall be referred to them or him respectively. AND that neither of the said parties to these presents, his executors or administrators, shall commence or bring any action or suit, or seek any remedy whatsoever, either in law or equity to be relieved in the premises before such difference shall be put to reference as aforesaid, (*and a covenant, that either of the copartners may dissolve the copartnership on giving notice, and paying money; and covenant for performance of covenants.*) [See p. xiv.] IN WITNESS, &c.

[No. 5.]

Seed of Copartnership

Between Brandy Merchants, where a Father advances Money to put his Son in Partnership, and agrees to guarantee for him, he being a Minor. With many Special Covenants.

Parties.

Business of a brandy merchant.

THIS indenture tripartite, made the — day of — in the — year of the reign of our Sovereign Lord George the Third, by the grace of God of *Great Britain, France and Ireland*, King, Defender of the Faith, &c. and in the year of our Lord — between *A. B.* of — street, *London*, brandy merchant, of the first part, *C. D.* of the same place, son of the said *A. B.* of the second part, and *E. F.* the younger of — of the third part. WHEREAS the said *A. B.* now and for many years past, hath alone followed and carried on his trade or business of a brandy merchant in the house wherein he now lives, situate in —
aforesaid.

aforesaid. AND whereas the said *A. B.* being desirous of settling his said son in the said business, and to continue him therein, HATH proposed to the said *E. F.* that he and the said *C. D.* shall be copartners in the said trade and business of a brandy merchant, upon equal terms of profit and loss, for such time, and on such terms and conditions as are herein after mentioned and agreed upon. AND the said *A. B.* hath agreed to advance to or for his said son, his share of the capital stock herein after mentioned and agreed, to be employed therein during the said copartnership, subject to the conditions, and upon the securities herein after mentioned and declared, and not otherwise. AND in regard the said *C. D.* is not now of the age of 21 years, he being only of the age of — years or thereabouts; he the said *A. B.* hath also agreed to be guarantee for his said son's faithful discharge and due performance of the several clauses and agreements herein after mentioned and contained, which on his the said *C. D.*'s part and behalf, are or ought to be performed, fulfilled and kept. Now THIS INDENTURE WITNESSETH, that for the carrying the said proposal of the said *A. B.* into execution, and in pursuance of the said recited agreement on the part of the said *A. B.* It is hereby mutually covenanted and agreed, by and between the said *A. B.* and *C. D.* and the said *E. F.* AND the said *A. B.* for himself, his heirs, executors and administrators, for and on the behalf of the said son, the said *C. D.* in respect of his not being of the age of 21 years as aforesaid, doth severally covenant, promise and agree to and with the said *E. F.* his executors and administrators. AND the said *E. F.* for himself, his heirs, excutors and administrators, doth covenant, promise and agree to and with the said *A. B.* his executors and administrators, by these presents, in manner following, (that is to say) that they the said *C. D.* and *E. F.* shall and will become, continue, and be joint traders and copartners, in the trade and business of a brandy merchant, in the buying

Agreement
for a part-
ship.

Father to
advance
money for
first partner,

and to gua-
rantee for
him, he be-
ing a minor.

Considerati-
on.

Mutual co-
venant

for a part-
nership

for 6 years. and selling of brandy and rum, and other liquors, for and during the term of 6 years (if both of them the said *C. D.* and *E. F.* shall so long live) to be computed, and to commence from the — day of — now next ensuing, in the shares and proportions, and subject to the clauses, provisos and agreements herein after mentioned, (that is to say) one moiety or half part, the whole in two equal parts to be divided, of the said joint stock and trade, and the profits and increase thereof, is and is hereby agreed and declared to be the share and property of the said *C. D.* subject nevertheless to such payments and conditions as are herein after particularly mentioned and declared. AND the other moiety or half part of the said joint stock and trade, and the profits and increase thereof, is and is hereby agreed and declared to be the share and property of the said *E. F.* and for the providing a sufficient joint stock for the carrying on the said joint trade, It is hereby agreed and declared by and between all the said parties to these presents, that the sum of 14,000*l.* shall be the capital joint stock for the carrying on the said joint trade and copartnership, (that is to say) 7000*l.* being one moiety thereof, is and is agreed to be brought in, and advanced and lent by the said *A. B.* to and for his said son, and the same is to be deemed as his the said *C. D.*'s. part and share in the said joint stock. BUT it is hereby agreed, that the said *A. B.* shall be allowed interest for the same, during the continuance of this copartnership, after the rate of 5*l. per cent. per annum*, and to be paid him out of his the said *C. D.*'s. share of the profits, to arise and be made of the said jointtrade as hereafter is mentioned. AND further, that the said share of the said *C. D.* in the said joint stock, shall always be subject and liable to the repayment of the said capital sum of 7000*l.* so advanced and lent by the said *A. B.* as aforesaid. AND the said *C. D.* shall have no power over the same, until the said sum and the interest thereof, shall be fully paid and satisfied without the consent of the said *A. B.* his executors or

for 6 years.

In moieties.

14000*l.* partnership stock.7000*l.* to be advanced by first partner's father,for which to be allowed 5*l. per cent.* interest.

admi-

administrators. AND the sum of 7000*l.* being the remaining moiety, or half part of the said joint stock, is and is agreed to be brought in and advanced by the said *E. F.* as and for his part and share of the said joint stock. AND it is hereby further mutually covenanted, agreed and declared by and between the said *C. D.* and *E. F.* and the said *A. B.* for, and on the behalf of the said *C. D.* his son, THAT the said trade and copartnership shall be carried on by the name, and under the firm of *C. D.* and *E. F.* and shall be so carried on and managed by them, in the house wherein the said *A. B.* now lives, situate in — street aforesaid; and the vaults and warehouses thereto belonging, and which they have taken of him, at the yearly rent of —*l.* AND the said *A. B.* doth by these presents, agree and declare, that the said joint trade shall not, during the continuance of this copartnership, be charged with, or pay more for rent for the said house, than —*l.* a year, being the same rent which he the said *A. B.* now pays for the same. AND it is also agreed, that the rent of the said house, and all taxes and other rates, and the charges of housekeeping, servants and journeymen's wages, and other charges, expences and all outgoings relating to the said joint trade and copartnership. AND all losses that shall, or may happen to the said *C. D.* and *E. F.* for or by reason or means of the said joint trade and dealing shall be borne, paid and sustained by the said joint stock, and the said *C. D.* and *E. F.* in proportion to their respective shares therein; save and except that in case either of them, the said *C. D.* and *E. F.* shall trust, or give credit to any person or persons, whom the other of them, or the said *A. B.* shall dislike, and shall before have forewarned the said partners, or either of them not to trust; that then and in such case, the party so trusting, shall make good to the said joint stock, the full value of the monies, good or effects which he shall so trust, or give credit for, within 6 calendar months then next following. AND it is further agreed, that neither of

Partnership firm.

Stock and trade to pay only 34*l.* per annum for rent of house, &c. and for carrying on business.

Charges of housekeeping, &c. to be paid out of stock.

One partner not to give credit against the consent of the other.

Neither to
compound
debts alone,
or release.

No separate
dealings.

Both part-
ners to be di-
ligent.

The first to
go beyond
sea when
requisite at
the partner-
ship ex-
pence.

Father of
first part-
ner to take
40*l.* per an-
num for his
son's use; se-
cond partner
the like.

Neither to
take money
out of trade,
or become
bond securi-
ty.

them, the said *C. D.* and *E. F.* shall or will compound any debt or debts so to be due to the said partnership estate, without the consent of the said *A. B.* or release or discharge any person or persons from the debts owing by them, to the said copartnership, without receiving the full of such debts; unless with the consent and approbation of the other of them, the said *C. D.* and *E. F.* and of the said *A. B.* AND also, that neither of them, the said *C. D.* and *E. F.* or the said *A. B.* shall or will, during the continuance of this copartnership, use or exercise the trade or business of a brandy merchant, or shall any ways deal in brandy or rum, or other liquors separately, for his own proper account, or in partnership, with or for the use or benefit of any other person or persons, but only for the joint interest and advantage of both of them, the said *C. D.* and *E. F.* in the proportions aforesaid. AND further, that they the said *C. D.* and *E. F.* shall, during the continuance of this copartnership, employ their whole time in the business thereof, and in the management thereof; that it shall and may be lawful for the said *A. B.* for the use of his said son *C. D.* to take out of the cash of the said joint stock, the sum of — *l.* a month, monthly, and the said *E. F.* the like sum of — *l.* a month, monthly, during the continuance of this copartnership, towards their own private and particular expences; the same to be charged to their several accounts, and that neither of them, the said *C. D.* or the said *A. B.* for him, or the said *E. F.* shall take out of the said joint stock, or the cash thereof, any other or further sum or sums of money, for his own separate use, without the consent of the said *C. D.* and *E. F.* and the said *A. B.* AND also, that neither of them, the said *C. D.* and *E. F.* or the said *A. B.* shall, during the continuance of this copartnership, become bond, bail, or otherwise engaged with, or for any person or persons whomsoever, for more than the amount of 100 *l.* in the whole, at any one time, or do or suffer to be done, any act, matter or thing by means, whereof

whereof the monies, goods, wares or effects of, or belonging to the said joint stock, shall, or may be seized, attached or taken in execution, for the separate debt of either of them, the said *C. D.* and *E. F.* and the said *A. B.* but that each of them, shall and will save harmless and keep indemnified the other of them, and the said joint stock, and the profits thereof, from his own separate debts, and from all losses and damages that may happen about the same. AND that neither of them the said *C. D.* and *E. F.* shall take any apprentice or apprentices, or other covenant servant or servants, to be employed in the said joint trade, without the consent in writing of the other of them, and the said *A. B.* first had and obtained for that purpose. AND in case they shall jointly agree, and shall, pursuant to such joint agreement, take any apprentice or apprentices, or other covenant servant or servants; that then all monies, which shall be given with such apprentice or apprentices, or other covenant servant or servants, shall be brought in, and added to the said joint stock, for the mutual and equal benefit of both of them, the said *C. D.* and *E. F.* AND that all charges and expences attending the keeping such apprentices, or other covenant servants, shall be equally borne by both of them, the said *C. D.* and *E. F.* AND it is hereby further agreed and declared, by and between all the said parties to these presents, that he the said *A. B.* shall, during the continuance of this copartnership be accommodated with a suitable lodging in the said house where the said joint trade is intended and agreed to be carried on as aforesaid, for himself and a man servant, without paying or allowing any money, or other consideration for the same; in consideration that he has lately laid out a considerable sum of money in repairing the same, and of his agreeing to permit them to carry on the said joint trade therein, during the continuance of this copartnership, at the same rent as he the said *A. B.* now pays for the same. AND also, that if any or either of the said parties shall bring in, and advance

Or take apprentices, &c.

Money received with apprentices, &c. to be brought to joint account.

Charges of keeping apprentices, &c. to be joint.

Father of first partner to have a lodging in the house gratis for himself and man.

5l. per cent. to be allowed for extra money advanced.

any sum or sums of money, with the consent of the other party, for the increase and better carrying on of the said joint trade; that the same shall always be considered as a debt or debts due and owing from the said copartnership, and shall be repaid such party so advancing the same with interest, after the rate of 5 *l.* for every 100 *l.* for a year, out of the said joint stock, and the produce thereof, and before any division shall be made thereof as before mentioned. AND it is hereby further agreed, that in case there shall, during the continuance of this copartnership, be any occasion for accepting or taking any bonds, mortgages or other securities for the payment of any debt, or sum of money to be due or owing to the said copartnership, the same shall be taken in the name of the said *E. F.* alone. BUT it is hereby declared, that the same shall be in trust for the said copartners, and shall be entered into the partnership books accordingly, as part of the said joint stock. AND it is hereby agreed and declared, by and between the parties to these presents, and the said *A. B.* doth hereby for himself, his heirs, executors and administrators, covenant and agree to and with the said *E. F.* his executors and administrators, that he the said *A. B.* during the continuance of this copartnership, shall and will act, and employ himself in and about the same, and do every thing according to the best of his skill and power, to promote the said business, so to be carried on by virtue of these presents, as shall be convenient to the said *A. B.* AND for that purpose, that he the said *A. B.* shall have recourse to all books of account, letters and papers relating to the said joint trade, and to inspect, insert therein, and take copies thereof, at his free will and pleasure, and that he shall be consulted by them the said *C. D.* and *E. F.* touching, concerning or relating to the said trade and business, in as full and ample manner, as if he was an actual partner therein with them. AND shall have liberty to draw upon the banker in the room of his said son, for any sum of money, that shall

be

Securities to
be taken in
second part-
ner's name.

In trust.

Covenant,
that the fa-
ther should
personally
act,

and draw
upon the
banker for
his son.

be necessary for carrying on the said trade, and to do all other acts touching the said trade and copartnership, as if he was an actual partner therein as aforesaid. AND shall have and receive for his attention and advice, in and about the said business and partnership's affairs out of his said son's share of the said joint stock, and the profits thereof, the sum of 100*l.* yearly. IT being the condition and meaning of the said *A. B.*'s entering into the covenants and agreements herein contained; and of the said *E. F.* entering into this copartnership with the said *C. D.* in manner herein mentioned. AND it is hereby further covenanted, agreed and declared, by and between the said *C. D.* and *E. F.* and the said *A. B.* for, and on the behalf of the said *C. D.* his son, that they the said *C. D.* and *E. F.* shall, at their joint and equal charge, provide from time to time, during the continuance of this copartnership, proper books of account, and they or some person or persons by their appointment, and with the consent of the said *A. B.* shall enter therein, just and true accounts of all their buyings, sellings, receipts, payments and dealings concerning their said joint trade, immediately after the same shall happen, and shall be just, honest and faithful to each other, in every respect concerning the said copartnership. AND that each of them the said *C. D.* and *E. F.* and the said *A. B.* his executors and administrators, for and on behalf of his said son *C. D.* shall have free liberty of access to the said books, from time to time, and to inspect, examine and copy the same, or any of the accounts or entries therein, to be contained or made at their own free will and pleasure, during the continuance of this copartnership, and for such time afterwards, as shall be agreed on by the said parties pursuant to these presents. AND FURTHER, that they the said *C. D.* and *E. F.* together with the said *A. B.* shall and will at *Michaelmas* next, or within a fortnight afterwards, and from thenceforth twice in every year during the continuance of

And receive
a yearly
consideration.

Books of account to be provided, &c.

Each to have access to them.

Accounts when to be made up and how.

of this copartnership, viz. on *Lady-day* and *Michaelmas-day*, or within one month after each such time, join together and make up, state and adjust, a true and fair account of adjustment and valuation, in writing, of all the monies, goods, wares, merchandize and effects belonging to the said joint stock, and of the debts owing from or to them the said *C. D.* and *E. F.* in respect to the said joint trade, and all other their joint dealings and transactions, to the intent it may appear how much the net produce of the said partnership stock and estate, and how much the part of each of them the said *C. D.* and *E. F.* may amount to, and what gains and profits shall have been made by the said joint trade and copartnership; and that upon the stating of every such account, such of the debts then due to the said copartnership as shall be esteemed bad or dubious, shall be separated from the others, and entered by themselves, and shall be estimated and valued in such account, and entered in the same accounts so to be stated at such valuation; and when each of such accounts shall be perfected, the same shall be transcribed in two books, and subscribed by both of them the said *C. D.* and *E. F.* and also by the said *A. B.* (if living) for and on behalf of the said *C. D.* his son; and that each of them the said *C. D.* and *E. F.* or the said *A. B.* for the said *C. D.* shall have the keeping of one of the said books: AND the said accounts, so from time to time settled, shall not be opened or unravelled unless there shall be any error therein, such error amounting to 20 *l.* and upwards, and then only for such error, and so as the same be discovered in the life-time of both of them the said *C. D.* and *E. F.* and not otherwise; and that upon every making up, stating and adjusting such half-yearly accounts, of and concerning such joint trade and dealing as aforesaid, all the clear gains, profits and produce of the said joint stock, trade and copartnership shall be parted, shared and divided by and between the said *C. D.* and *E. F.* (that is to say) one moiety or half part, the whole in two equal parts

Each to have
a copy, &c.

Accounts
not after-
wards to be
opened un-
less, &c.

Profits to be
divided.

parts to be divided of the said gains, profits and produce, shall be paid and delivered to the said *C. D.* his executors or administrators, in trust for, and for the use of the said *C. D.* and the other moiety or half part of the said gains, profits and produce, shall be paid and delivered to the said *E. F.* his executors or administrators. BUT it is hereby agreed and declared by the said *C. D.* that at every such division of the net gains, profits and produce of the said joint stock to the said *A. B.* his executors and administrators shall and may, out of the said *C. D.*'s share of the said net gains, profits and produce of the said joint stock, retain and pay him and themselves interest after the rate of 5 *l. per cent. per annum* for the said 7000 *l.* so advanced and brought in by him the said *A. B.* as and for his said son's share in the said capital joint stock as aforesaid, and all other sum and sums of money hereby agreed to be paid or allowed to the said *A. B.* and which the said *C. D.* shall be any ways indebted to the said *A. B.* AND further, that at the expiration of this copartnership, they the said *C. D.* and *E. F.* shall join in account together, make up, state, settle and adjust a true and fair account in writing of all monies, goods, wares, merchandize and effects belonging to the said joint stock, and of all debts due and owing to and from the said *C. D.* and *E. F.* in respect of their joint trade, and after payment of all sums of money advanced and lent by any or either of the said parties to the said copartnership, and with interest for the same as aforesaid; and payment and satisfaction shall be made of all such debts as shall be due from them in respect to the said trade or good order taken for that purpose, all the monies, goods, wares, debts and effects then being part of or belonging to the said joint stock and partnership, shall be parted and divided into two equal parts or shares, one of which said two parts shall be the property of the said *C. D.* his executors or administrators, but subject to the payment of what shall be due to the said *A. B.* as aforesaid, and the other

Interest money to be paid there-out.

General settlement and division at the end of the partnership.

Each to assign, &c. with further assurance.

No benefit of survivorship.
In case of the death of first partner before account time, second partner to give bond with sureties for payment of partnership money, &c.

other of the said two parts shall be the property of the said *E. F.* his executors or administrators, and the same shall be divided by lots, in case of disagreement between them. AND each of them the said *C. D.* and *E. F.* his executors or administrators, shall not only assign and release to the other of them the part or parts that shall belong or be allotted to him, but shall do all acts and things to assist and enable him to recover the same. AND it is further agreed, that if either of them the said *C. D.* and *E. F.* shall die before the expiration of the said term of six years, no benefit of survivorship shall be had or taken thereby, other than as hereafter expressed. AND it is hereby further concluded, covenanted, agreed and declared by and between the said *C. D.* and *E. F.* and the said *A. B.* for and on the behalf of the said *C. D.* his son, that in case the said *C. D.* shall happen to die before the ——— day of ——— now next ensuing, and the said *E. F.* shall him survive, then and in such case he the said *E. F.* his executors or administrators, shall have, take and enjoy to their own use all the ready money, goods, wares, debts and other things then belonging, due or owing to the said joint stock and estate, and the gain, profits and increase of the same, and in lieu and satisfaction of the said *C. D.*'s share and proportion therein, shall execute and deliver unto the said *A. B.* his executors or administrators, within 30 days after the death of the said *C. D.* a bond or obligation in a sufficient penalty; and the said *E. F.* also shall and will within 60 days next after the death of the said *C. D.* procure one or more sufficient able person or persons, to be approved of by the said *A. B.* his executors or administrators, as securities for the said *E. F.* and such person or persons so to be procured shall also execute and deliver unto the said *A. B.* his executors or administrators, within the said 60 days after the death of the said *C. D.* the like bond or obligation in the same penalty, conditioned for the payment unto the said *A. B.* his executors or administrators, of the sum or value that shall have been

been brought into the said joint stock by the said *A. B.* for his said son, and in discharge of all demands due to the said *A. B.* on account of the said partnership (the sums that shall have been taken out and received by the said *A. B.* for the use of his said son as aforesaid, being thereout first deducted) at three equal payments, payable by instalments (that is to say) one third part thereof within four calendar months, one other third part thereof within eight calendar months, and the remaining third part thereof within twelve calendar months, to be computed respectively from the day of the death of the said *C. D.* together with interest for the same, with interest. after the rate of 5 *l.* a-year for every 100 *l.* and so in proportion for any lesser sum, from the — day of — now next ensuing, being the time of the commencement of this co-partnership. BUT if the said *C. D.* shall happen to die after the making and finishing such first half yearly account as aforesaid, and before the expiration or other sooner determination of this co-partnership, and the said *E. F.* shall him survive, In case of death after security to be given for the amount of deceased's share of property. that then the said *E. F.* his executors or administrators shall have, take, and enjoy to his and their own use all the ready money, goods, wares, debts and other things then belonging, due, or owing to the said co-partnership, stock and estate, and the gains, profits and increase of the same, and in lieu and satisfaction of and for the said *C. D.*'s share and proportion thereof the said *E. F.* shall within thirty days from the death of the said *C. D.* execute and deliver to the said *A. B.* his executors or administrators a bond or obligation in a sufficient penalty, and also shall and will within sixty days next after the decease of him the said *C. D.* procure one or more sufficient or able person or persons as security for him the said *E. F.* to be approved of by the said *A. B.* his executors or administrators, and such person or persons so to be procured, shall also execute and deliver unto the said *A. B.* his executors or administrators within the said sixty days next after the death of the said *C. D.* the like bond or obligation in the same penalty conditioned

ditioned for the payment unto the said *A. B.* his executors or administrators, such sum of money as the part, share, and interest of the said *C. D.* appeared to amount unto upon the foot of such last stated account or estimate to secure to the said *A. B.* his executors and administrators what shall be due and owing to him or them, for, or on account of the money so lent and advanced by him as aforesaid, and all other monies due and owing to him by virtue of these presents; and the residue thereof (if any) in trust for the executors and administrators of the said *C. D.* (the sums which shall have been taken out or received by the said *A. B.* for the use of the said *C. D.* since the making up and stating such last account, being first thereout deducted) at the times and in the proportions aforesaid, together with interest for the same, at the rate aforesaid, from the stating such last account as aforesaid; and in either of the said cases, upon the giving and executing such several bonds by the said *E. F.* and his securities as aforesaid, the executors or administrators of the said *C. D.* shall execute and deliver to the said *E. F.* a release of his the said *C. D.*'s share and interest of and in the monies, goods, wares, debts and effects of the said joint trade and stock. AND the said *E. F.* shall execute and deliver to the executors or administrators of the said *C. D.* a bond or obligation in a sufficient penalty, with one or more sufficient person or persons as sureties, conditioned for the paying and satisfying all such debts as were due and owing by or from the said copartners, in respect of the said joint trade, at the death of the said *C. D.* within 12 months next after the death of the said *C. D.* and for indemnifying and saving harmless the executors or administrators of the said *C. D.* from the same, and from all costs, charges, damages and expences that may happen on account thereof. BUT if the said *E. F.* shall be unable, or neglect to procure some sufficient person or persons to become bound with him in such bonds as aforesaid, then it shall and may be lawful to and for the said *A. B.*

The representatives of the first partner in such case to release.

2d partner to give security, &c. for payment of debt,

and to indemnify.

For want of sureties, the father to possess himself of partnership property, and sell, &c.

A. B. his executors or administrators, for the use and benefit of himself, and the executors and administrators of the said *C. D.* as herein before is mentioned, to take possession of and receive all the monies, goods, wares, debts and effects of and belonging to the said joint trade, stock and copartnership, and to sell and dispose of the same, and by and out of the monies arising thereby, in the first place to pay and satisfy all the debts due and owing from the parties in copartnership, and in the next place to satisfy himself or themselves, the money for which such bonds were to have been given as aforesaid, returning the overplus to the said *E. F.* his executors or administrators, and in such case the said *E. F.* shall assign unto the said *A. B.* his executors or administrators in trust and for the purpose aforesaid, all the monies, goods, wares, debts and effects of the said joint stock and trade, and shall not possess himself of or receive the same or any part thereof; but shall authorize and empower the said *A. B.* his executors or administrators to receive and dispose of the same for the purposes aforesaid. AND it is hereby further covenanted, agreed and declared by and between the said parties, and particularly the said *A. B.* doth hereby for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said *E. F.* his executors and administrators, as followeth, (that is to say) That in case the said *E. F.* should happen to die before the — day of — now next ensuing, and the said *C. D.* shall him survive, then and in such case he the said *A. B.* his executors or administrators, shall have and take all the ready money, goods, wares, debts and other things then belonging, due or owing to the said joint stock and estate, and the gains, profits and increase of the same, and in lieu and satisfaction of the said *E. F.*'s share and proportion therein, he the said *A. B.* if he shall be then living; but if he shall be dead, then some one or more other sufficient and able person or persons as the said *C. D.* shall procure, and such as the

2d partner
to assign, &c.

In case of
death of 2d
partner, the
father of 1st
to take the
partnership
effects, and
give security
for pay-
ment of mo-
ney, &c.

executors

executors or administrators of the said *E. F.* shall approve of, shall for and on the behalf of, and as security for the said *C. D.* execute and deliver unto the executors or administrators of the said *E. F.* within 30 days after his death, a bond or obligation in a sufficient penalty, conditioned for the payment, unto the executors or administrators of the said *E. F.* of the sum or value that shall have been brought into the said joint stock by the said *E. F.* (the sums that shall have been taken out or received by him for his own use being thereout first deducted) at three equal payments (that is to say) one third part thereof within four calendar months, and other third part thereof within eight calendar months, and the remaining third part thereof within 12 calendar months, to be computed respectively from the day of the death of the said *E. F.* together with interest for the same after the rate of 5*l.* a year for every 100 *l.* and so in proportion for any lesser sum, from the — day of — next, being the commencement of this copartnership. But if the said *E. F.* shall happen to die after the making and finishing such first half yearly account as aforesaid, and before the expiration or other sooner determination of this co-partnership, and the said *C. D.* shall him survive, that then the said *A. B.* his executors or administrators shall have and take all the ready money, goods, wares, debts and other things then belonging, due or owing to the said co-partnership stock and estate, and the gains, profits and increase of the same to and for the use and benefit of the said *C. D.* subject nevertheless to the demands of the said *A. B.* as aforesmentioned, and in lieu and satisfaction of and for the said *E. F.*'s share and proportion thereof, the said *A. B.* if he shall be then living, but if he shall be dead, then some one or more other sufficient and able person or persons as the said *C. D.* shall procure, and such as shall be approved of by the executors or administrators of the said *E. F.* shall, for and on behalf of, and as security for the said *C. D.* execute and deliver

by install-
ments,

with interest
&c.

deliver unto the executors or administrators of the said *E. F.* within sixty days after his death, a bond or obligation in sufficient penalty, conditioned for the payment to the executors or administrators of the said *E. F.* such sum of money as the part, share and interest of the said *E. F.* appeared to amount to upon the foot of such last stated account or estimate (the sums which shall have been taken out or received by the said *E. F.* for his own separate use since the making up and stating such last account being first thereout deducted) at the times, and in the proportions aforesaid, together with interest for the same at the rate aforesaid, from the stating such last account as aforesaid. And in either of the said cases last mentioned, upon the giving and executing such bond by the said *A. B.* or other securities of the said *C. D.* as last aforementioned, the executors or administrators of the said *E. F.* shall execute and deliver to the said *A. B.* his executors or administrators, in trust for, and for the use of the said *C. D.* his executors or administrators (but subject to such demands of the said *A. B.* as aforementioned) a release of his the said *E. F.*'s share and interest of and in the monies, goods, wares, debts and effects of the said joint trade and stock; and the said *E. F.* if he shall be then living, but if he shall be dead, then some one or more other sufficient and able person or persons, as the said *C. D.* shall procure, and such as shall be approved of by the executors or administrators of the said *E. F.* shall (for and on behalf of the said *C. D.*) execute and deliver to the executors or administrators of the said *E. F.* a bond or obligation in a sufficient penalty, conditioned for the paying and satisfying all debts as were due and owing by and from the said co-partners, in respect of the said joint trade, at the death of the said *E. F.* within twelve calendar months next after the death of the said *E. F.* and for indemnifying and saving harmless the executors or administrators of the said *E. F.* from the same, and from all costs, charges, damages and expences that may happen on account thereof;

to release,
&c.

and to indemnify.

If no sureties, representatives of second to act.

but if neither the said *A. B.* nor such other person or persons so to be procured by the said *C. D.* as his securities as aforesaid, shall execute and deliver such bond to the executors or administrators of the said *E. F.* as aforesaid, then it shall and may be lawful to and for the executors or administrators of the said *E. F.* to take possession of and receive all the monies, goods, wares, debts and effects of and belonging to the said joint trade, stock and co-partnership, and to sell and dispose of the same, and by and out of monies arising thereby, in the first place to pay and satisfy all the debts due and owing from the parties in co-partnership, and in the next place to satisfy himself or themselves the money for which such last mentioned bonds were to have been given as aforesaid, returning the overplus to the said *A. B.* to and for the use and benefit of the said *C. D.* his executors or administrators, subject to such demands of the said *A. B.* as aforementioned. AND in such case the said *A. B.* for and on behalf of the said *C. D.* his son, doth hereby covenant and agree with the said *E. F.* his executors and administrators, that all the money, goods, wares, debts and effects of the said joint stock and trade shall be assigned or otherwise effectually vested in the executors or administrators of the said *E. F.* for the purposes aforesaid, and that the said *C. D.* shall not possess himself of, or receive the same or any part thereof, but shall and will permit and suffer, and (as far as in him lieth) fully authorize and empower the executors or administrators of the said *E. F.* to receive and dispose of the same for the purposes aforesaid. AND the said *A. B.* for himself, his heirs, executors and administrators, doth covenant, promise and agree, to and with the said *E. F.* his executors, administrators and assigns, by these presents, that in case the said *C. D.* shall happen to die before the expiration of this co-partnership, and the said *E. F.* shall him survive, and shall chuse to continue the said business of a brandy merchant in the said house be-

longing

Effects to
be assigned,
&c.

Second
partner to
carry on the
business
solely on a
certain
event.

longing to the said *A. B.* then, but not otherwise, he the said *E. F.* shall have the sole and entire benefit and advantage of carrying on the same therein, and that then and in such case, and for that end and purpose he the said *A. B.* his executors or administrators, shall and will, *within* one month next after the decease of the said *C. D.* assign and transfer unto him the said *E. F.* the said messuage or tenement and premises with the appurtenances, together with the indenture of lease thereof, and all his, the said *A. B.*'s estate, right and interest therein; to hold the same unto the said *E. F.* his executors, administrators and assigns from thenceforth, for and during all the rest and residue of the term of years which the said *A. B.* shall then have therein; but subject to the rent and covenants in the same lease, reserved and contained on the said lessees part to be paid and performed; and upon condition that he the said *E. F.* do and shall upon such assignment being executed as aforesaid, pay or cause to be paid unto him the said *A. B.* his executors or administrators, in lawful money of *Great Britain*, what the said messuages and premises, shall by two indifferent persons to be for that purpose nominated, one by the said *A. B.* his executors or administrators, and the other by the said *E. F.* be valued at, and do and shall pay the charges of drawing and ingrossing the said assignment. PROVIDED always, and it is hereby agreed and declared, by and between the said parties to these presents, that in case either of the said *C. D.* and *E. F.* shall at the end or expiration of this copartnership think fit to quit the said trade, the other copartner shall chuse to continue to carry on the same, and of which shall give notice in writing of such his intention of quitting the said trade and business, 6 months before the end of the said copartnership. THEN and in such case the said copartnership stock, estate and effects shall be made up, applied and secured to the said respective partners in the same manner, as is herein before declared, touching either of

House, &c.
to be assigned to him.

Value to be ascertained by arbitrators.

Proviso, for notice to be given in case, either should not choose to continue after, &c.

the said partners' death, after the stating of any such half yearly accounts as aforesaid; but it is hereby agreed and declared, to be the intention and meaning of the parties hereto, that at the end and expiration of this copartnership, that he the said *E. F.* shall continue with the said *C. D.* in copartnership, for the term of seven years, upon the terms herein expressed and declared, in case the said *C. D.* shall be desirous thereof, unless there shall be any reasonable objection thereto, on the part of the said *E. F.* AND it is hereby also covenant, agreed and declared by and between the said *C. D.* and *E. F.* and the said *A. B.* for and on behalf of the said *C. D.* his son, that if any variance, strife, difference or controversy shall at any time, during the continuance of this copartnership, or at the end or other sooner determination thereof, happen to grow, arise or be between all or any of the parties to these presents, their, or any or either of their executors or administrators, upon, touching or concerning the said joint trade or dealings, or any the buyings, sellings, accounts, matters or things relating thereunto, or for, or touching any covenant, clause, matter or thing in these presents contained; then, and so often as such variance, strife, difference or controversy shall happen, they the said parties to these presents, and each and every of their executors or administrators, shall upon reasonable request made by either or any of them, before any suit shall be commenced, for or touching the same, cause to be elected, named and chosen 3 indifferent persons to hear and determine the said difference and matters in difference, one of which arbitrators the said — *C. D.* and the said *A. B.* their executors or administrators shall name and chuse, and the said *E. F.* his executors or administrators shall name and chuse one other of the said arbitrators, and the said two arbitrators so to be nominated by them, the said parties to these presents, shall chuse and name the third arbitrator, and that each of them the said parties, and each and every of them, their

Differences
to be set-
tled by ar-
bitration.

their and each and every of their executors or administrators shall respectively stand to, and perform and keep such award, order, determination and judgment, which the said three arbitrators, or any two of them shall make, and give in writing under their hands and seals unto the parties subject by these presents thereunto, upon and touching the said differences and matters in difference, so that the said award be made and given as aforesaid in writing, within forty days next after the choice or nomination of the said arbitrators in that behalf. AND it is further agreed by and between the said parties to these presents, that such submission and reference shall always be made a rule of his Majesty's Court of Common Pleas at *Westminster*. IN WITNESS, &c.

To be made
a rule of
court.

[No. 6.]

Agreement

Between Persons to fit out a Ship to the *East-Indies*, and each to have an equal Share of the Profits at her Return.

WHEREAS *T. B.* commander of the good ship called the — whereof *S. C.* of — and *G. P.* are part owners, is bound out in and with the said ship in a voyage to *China*, and back again to the port of *London*: AND WHEREAS the said *S. C.* *G. P.* and *T. B.* have agreed to make up together a stock of — *l.* sterling, to be laid out and invested in goods, wares and merchandizes, for the equal benefit of all the said parties; for which purpose the said *S. C.* and *G. B.* have each of them paid into the hands of the said *T. B.* the sum of — *l.* the receipt whereof the said *T. B.* doth hereby acknowledge. Now THEREFORE IT IS AGREED between all the said parties, and the said *T. B.* doth hereby covenant, promise

Recital of
the ship be-
ing bound
to, &c.

And of
agreement
to raise a
stock to be
laid out in
goods.

Agreement
of all the
parties.

and agree to and with the said *S. C.* and *G. P.* their executors, administrators and assigns, jointly and severally, that he the said *T. B.* shall and will add and make up — *l.* of his own money, to the said — *l.* paid him by the said *S. C.* and *G. P.* and that he the said *T. B.* shall and will, upon the said ship's arrival at *China*, or in her said intended voyage, lay out and invest the same in goods, wares and merchandizes, to the most profit and advantage of all them the said parties that he can, according to the best of his judgment, and with respect to the orders and directions of them the said *S. C.* and *G. P.* in and touching the same; and shall and will bring home the effects and produce thereof in and with the said ship, (the casualties of the seas excepted) and upon the arrival at *London*, or any other port in *England*, or sooner if opportunity shall serve, shall and will send the invoice of the produce of the said — *l.* to the said *S. C.* and *G. P.* their executors or assigns, or some of them at *London*, and will also make a just and true account to them, or some of them, of all the produce of the said — *l.*

AND IT IS AGREED between all the said parties, that all the produce and effects of the said — shall be sold and disposed of at *London* with all convenient expedition after arrival thereof, for the equal advantage of all the said parties, and that each of them shall have and receive one full third part of the net proceeds thereof. And, &c. [no benefit of survivorship. See p. vii.] IN WITNESS, &c.

[No. 7.]

An Agreement to continue a Partnership.

ARTICLES, &c. between *M. B.* of the one part, and *H. P.* of the other part.

Whereas the said *M. B.* and *H. P.* have for several years last past been equally concerned together as partners or joint traders in the trade of —, and in all profits and losses thereby. AND WHEREAS before sealing hereof, they have made up between them a full account and reckoning of and concerning the said trade, goods and debts belonging and owing to and by them on account thereof, containing all charges, profits and loss thereby, whereof each of them, hath to the date thereof, paid and received one equal moiety or half part, and upon making up the said account, there appears to be remaining in stock, at the sealing hereof, in goods and debts owing on account of the said trade, the sum or value of — which belongs to them jointly, and wherein they are equally concerned; out of which said stock are due and payable on account of the said joint trade, several debts amounting to —/. AND WHEREAS the said parties intend to continue the said trade of —, in the dwelling house of the said *M. B.* in, &c. for — years, with the said joint stock of, &c. and to be concerned therein equally as to profit and loss. NOW THESE PRESENTS WITNESS, that in consideration of the trust and confidence which the said parties have had and repose in each other, it is hereby declared, covenanted and agreed by and between the said parties for themselves, their executors, administrators and assigns, that the said parties are and will become and continue partners and joint traders in the trade of biscuit baking, and vending and selling of biscuits upon a joint and equal account between them, for profit and loss for the said time or term of —

Recital, that the parties have been several years copartners.

That accounts are settled.

And that they intend to continue their copartnership.

Agreement to continue.

Profit and
loss.

In consid-
eration of the
rent, one of
the partners
to have a
particular
benefit.

Not to do
any act to
incumber.

years to commence from the date hereof, if both the said parties shall so long live. AND IT IS AGREED, that all charges and losses, and all profits arising by and on account of the said joint trade shall be equally paid, received and borne by and between the said parties, and that the said *M. B.* for and in consideration of the rent of the shop and other conveniencies wherein the said trade is driven, shall have and receive all benefit and advantage to be had and made by the bran arising by the flour or meal used in the said joint trade as he hath hitherto received the same. AND it is further agreed, &c. (that the parties be true to each other), and have not, shall not, nor will do or suffer any act or thing whatsoever, whereby or by means whereof any goods, monies or things belonging to the said joint trade shall or may be extended, seized or taken in execution, but that each of them shall and will defend the said joint stock and trade from their own private and separate debts, and all damages by reason thereof. AND THAT [*accounts to be settled at the end of the term, See p. xxviii.*]*—No survivorship* [See p. xviii.] IN WITNESS, &c.

[No. 8.]

Covenants

Indorsed on Articles of Copartnership for continuing the same, with other Covenants.

THESSE PRESENTS INDORSED WITNESS, That it is mutually declared and agreed between the within named *A.* and *B.* for themselves, their executors and administrators respectively, that the partnership and joint trade between them within mentioned, shall be continued between them for the term of — years, from the expiration, (or you may begin thus) : WE the within named *A.* and *B.* do by these present indorsed,

indorsed, declare and mutually covenant and agree unto and with each other, his and their executors and administrators to continue the said joint trade and partnership within mentioned for the further term of ——— years, from the expiration, &c. of the ——— years within mentioned, to be accounted, if both of them shall so long live, with the joint stock; and under, and subject to the several covenants and agreements as are within expressed and contained. AND WHEREAS since the sealing and executing the within indenture of partnership, the said *A.* hath bought and purchased the lease and term of and in the said messuages and premises within mentioned, which he then held at a rack rent. IT IS THEREFORE FURTHER DECLARED and agreed between the said parties, that if the said *A.* shall happen to die before the expiration of the said term of ——— years, and the said *B.* shall him survive, that then the executors and administrators of the said *A.* are only to grant, and when the said *B.* giving security for payment to the executors or administrators of the said *A.* of so much money, as the said *A.* his part and share in the joint stock, and debts which shall then be owing on account of the said joint trade shall amount unto for the sum of ——— *l.* to be allowed to the said *A.* for his charges, in repairs and other works about the said house, as in the within indenture in that behalf is expressed, and according to the true meaning thereof, they the executors and administrators of the said *A.* shall and will at the charge of the said *B.* seal and execute to him a lease of the said messuages or tenements for the term of ——— years, to commence from the quarter day next after the decease of the said *A.* at the yearly rent of ——— *l.* to be paid quarterly, and with such covenants to be continued therein as are contained in the lease, whereby the said *A.* holds the said premises, which lease the said *B.* agrees to accept, and at the same time to seal a counter-part thereof to the executors or administrators of the said *A.* and that the said executors or administrators are not to grant his lease
and

and term of years therein as within is mentioned, nor any further term therein, otherwise than as aforesaid; the within written indenture, &c. IN WITNESS.

[No. 9.]

Form of a Charter-Party, Generally used by Merchants.

N.B. This deed must be drawn upon a six shilling stamp.

THIS CHARTER PARTY of affreightment entered into this — day of — in the — year of the reign of —, and in the year of our Lord —, between *A. B.* master of the good ship or vessel called *the Royal Charlotte*, of the burthen of six hundred tons, or thereabouts, now lying in the port of *Liverpool*, of the one part, and *C. and D.* of *Liverpool*, in the county of *Lancaster*, merchants, freighters of the said ship, of the other part, WITNESSETH, that the said *A. B.* hath this day letten the said ship to freight from *Liverpool*, aforesaid, to the port of *Drontheim*, and from thence to the port of *Newry* in *Ireland*, and the said freighters have hired the same in manner and form following, (that is to say) that the said ship now, and shall during the said voyage, be at the expence of the said *A. B.* or his assigns kept staunch, tight and strong, well manned, victualled, tackled, and provided in every respect fit for the merchants' service, and particularly for performing such a voyage, (the dangers and perils of the sea, restraints of princes and rulers, fire and enemies, during the same always excepted). AND ALSO, that the said *A. B.* or his assigns shall and will with all convenient dispatch, proceed with the said vessel to the port of *Drontheim*, and there receive on board from the agents of the said *C. D.* a full loading of deals over all; and being so loaden, the said master with the ship and cargo shall with the first opportunity of wind and weather, proceed directly for *Newry* aforesaid, and on
her

her arrival there, deliver the same to the assigns of the said *C.* and *D.* at such convenient place or places, where the said ship and cargo may safely come. AND also that the said ship shall for her loading at the port of *Drontheim* stay twenty running days, and for discharging at *Newry* fifteen running days, that is to say, thirty-five running days in the whole, if required, and so end the said intended voyage, IN consideration of which, the said freighters or their assigns, agree not only to load and put on board the said ship, the said cargo at the port of *Drontheim* as aforesaid, and to receive or cause the same to be received from on board her at *Newry* aforesaid, and that within the days and time limited for her loading and discharging as aforesaid, but also shall and will pay, or cause to be paid unto the said *A. B.* or his assigns in full for the freight and hire of the said ship, for the said voyage, at and after the rate of *thirty-five shillings and sixpence (Irish sterling)* per standard hundred for the deals which shall be loaden on board of the said vessel at *Drontheim*, and delivered at *Newry*, with two-thirds of all pilotage and port charges during the voyage, the freight to be paid as follows, that is to say, the said master to be supplied with what cash he may want for the ship's necessary disbursements at *Drontheim* and *Newry*, the remainder by good bills on *London*, at three months date, together with the sum of *four guineas* per day, to be paid by the day, as the same shall grow due, for every day of the said ship's detention, over and above the days and time limited for her loading and discharging as aforesaid. AND also the ship to be at no expence for lighterage or risk attending the cargo after it is put over board. AND for the true performance hereof, each of the said parties bindeth himself, his executors, administrators and assigns reciprocally unto the other, especially the said *A. B.* bindeth his said ship, her freight and appurtenances; and the said freighters, their goods to be loaden on board her, each to other, in the penal sum of seven hundred

hundred pounds sterling, firmly by these presents. IN WITNESS whereof, each of the said parties hath hereunto set his hand and seal the day and year first within written.

Sealed and declared, being first duly } *A. B. L. S.*
stamped, in the presence of } *C. and D. L. S.*

E. F. witness to the signature of *C. and D.*

G. H. witness to the signature of *A. B.*

[No. 10.]

A Copartnership

Between two Persons, whereby no present Stock is deposited, but each Party is to advance Money monthly.

THIS Indenture, &c. BETWEEN *T. N. &c.* and *J. D. &c.* WHEREAS (*recital as to lease of premises*). AND WHEREAS (*recital as to their agreeing to become partners*) NOW THIS INDENTURE WITNESSETH (*on usual consideration become partners*).

AND to the end, intent and purpose the better to enable them the said parties to carry on such trade or business and workmanship as aforesaid, it is hereby further covenanted and agreed between the said parties hereto, that each of them the said parties shall, immediately after the execution hereof, and afterwards every week, or month, or otherwise, equally advance such sums of money from time to time in every year during this copartnership, and as the said copartners shall mutually agree, as shall be necessary and sufficient for, and as a stock as well for the buying of all such — to be by them sold, bartered or vended as aforesaid; as also for the buying of all such tools, instruments, oil, &c. and all other necessary materials whatsoever, to be used for the working and other things

Each party to advance money weekly or otherwise.

For buying goods and materials, and paying all incident charges.

things for sale or otherwise; as likewise for the paying and defraying of all other necessary and incident charges and expences whatsoever relating to the buying, bartering, selling and vending of such ——— and other things, or otherwise touching or concerning the said joint trade or business. AND FURTHER, As to each party's share. that all such monies or stocks so to be advanced as afore-As to each party's share.said, and all gains, increase, profit, produce and proceeds thereof shall be used and employed by and between the said parties to these presents, to and for their joint uses and upon their joint account both of profit and loss, according to their respective shares therein, and the covenants and agreements herein after mentioned and expressed touching the same, (that is to say) that they the said parties, and their respective executors and administrators, shall at all times during the continuance of this copartnership, and at the determination of the same, have a several and particular right. No benefit of survivorship. [Share of the profits, see p. ix.] AND that neither Monies to be used in this trade only. [no benefit of survivorship, see p. vii.] AND that all such money and stock so to be advanced and made as afore-To be true to each other.said, shall be by them the said partners used, disposed and employed in the said joint trade or business, in manner as afore-Not to become bail.said, for the utmost profit and advantage of them the said parties in such moieties as afore-As to T. N. confessing a judgment.said, and not otherwise. AND [to be true to each other, see p. ix.] AND that neither of the parties to use any *other* trade without consent, see p. ii. AND [not to become bail, see p. xii.] AND that if at any time during this copartnership the said T. N. shall procure, permit or suffer any judgment to be recovered or maintained against him for any sum or sums of money whatsoever (not due upon account of the said joint trade); and in case any execution shall be thereon prosecuted or sued forth against his person, or his part or share in the said then joint stock and trade, that then and in such case he the said T. N. without his immediate making satisfaction for the same out of his own proper monies, shall therefore forfeit and

A P P E N D I X.

The same
as to *J. D.*
Not to lend
money.
All charges
to be paid by
partners.

As to the
new and old
buildings of
the mes-
suage.

As to ap-
prentices.

and lose all his part or share of and in the said stock and trade unto the said *T. D.* and also from thenceforth shall lose all his then future benefit and produce to arise, or be had or made thereby, any thing herein contained to the contrary thereof notwithstanding. AND, &c. [the same as to *J. D.*] AND, &c. [not to lend money, see p. vii.] AND, &c. [all charges, &c. to be paid by partners, see p. vi.] AND WHEREAS the said messuage or tenement being let to both the said parties, and he the said *T. N.* not now dwelling in any part thereof, and he the said *J. D.* now holding the old building quite upright, together with the wash-house thereunto adjoining, being part of the same, and there being another part thereof which is new-built, &c. now it is hereby further agreed and covenanted by and between the said parties hereunto, that until such new building shall be let, or his the said *T. N.*'s residence or dwelling therein, that he the said *J. D.* shall yearly, during the said copartnership, allow and pay quarterly unto the said *T. N.* the sum of — for the said old building and wash-house now enjoyed by him as aforesaid. AND that from and after such new building shall be let to any person or persons during this copartnership, that the rent thereof shall go and be equally divided between them the said parties during the time of such letting thereof. AND it is hereby mutually covenanted, agreed and declared by and between the said parties hereto, that no apprentice, during the term, shall be taken by either of them the said copartners into the said joint trade or business, without the mutual consent of each other: and in case any such apprentice or apprentices during the said copartnership shall be by them so taken, that then and in such case all and every sum and sums of money to be had and received with every such apprentice shall be equally divided between them the said parties, share and share alike; and also that each of them the said parties shall have liberty and authority during this copartnership to command and employ each other's apprentice.

prentices in and about the business relating to the said joint trade. AND, &c. [books of account to be kept, see p. x. and xvii.] AND FURTHER ALSO, [to account once a year, see p. xvi.] AND FURTHER ALSO in case either of the said parties hereunto shall happen to die before the end of this present copartnership, or before or after any such general account so made up, and stated and subscribed between them in manner as aforesaid; and that there shall be any debts due from or to the said parties hereto, on account of the said joint trade, that then and in that case all such debts as shall be then due from the said parties on account of such their joint trade shall be by them forthwith equally paid by the surviving partner, and the executors or administrators of the partner so dying; and that then and in such case, all and every the debts as shall be then due to the said copartners on account of their said joint trade, shall be likewise equally shared and divided between the said surviving partner, and the executors and administrators of the party so dying, and in case they cannot agree touching the division thereof, then the same shall be done by casting of lots as in such case usually accustomed, and that then and in such case, also the surviving partner within ten days next after the decease of his partner, do, shall and will (if so required) at the request and charge of the executors or administrators of the party so dying, and at his her or their expence, either assign or pay, or secure to be paid to the said executors or administrators, all such deceased partner's share of and in all and every the debts so due to the said joint trade as aforesaid, within twenty days then next following. AND FURTHER ALSO, that from and after such end or other determination of this present copartnership, all such debts as shall be then due to the said joint trade, and so to be divided in manner as aforesaid, shall go, belong and appertain to the parties as follows, viz. THE debts so shared, divided or allotted to the executors or administrators of the party dying, shall go and be to his, her or their use

Books of account.

To account once a year.

If either of the parties shall happen to die,

all debts to be equally paid,

and all debts due to be equally divided.

Surviving partner to assign the share, &c. to the executors or administrators.

Of the division of debts, &c.

or benefit, and the debts so divided, shared or allotted to the surviving party, shall go and be to and for the use and benefit of him, his executors and administrators, and that all such debts so respectively shared, divided or allotted in manner as aforesaid, shall and may be so received, had, taken and enjoyed accordingly; and that as well the surviving partner, his executors and administrators, as also the executors and administrators of the party dying, shall not without the consent in writing of each other, release, discharge, compound or acknowledge satisfaction for any such debt or debts, but shall by all lawful ways and means whatsoever, as shall be requested by each other, and at the charge of such person so requesting, do all reasonable acts and things, either by letter of attorney or otherwise, for the better enabling each other, the executors or administrators of each other, to sue for, recover, receive and discharge all and every such debts as shall be so divided or allotted to each other, in manner as aforesaid. AND it is hereby further mutually covenanted and agreed, by and between the said parties, that in case either of the said parties shall happen to die, before the end of this copartnership, and in such case, if the widow of such party dying, shall be minded to come in and carry on the said joint trade, with the surviving partner, during the then residue of the said term, and shall give 20 days notice thereof to such surviving partner, that then and in such case the widow of such party so dying, at the end of 20 days notice thereof to the surviving partner, shall be admitted and continue, and be as a copartner with such surviving partner in the said joint trade, during the then residue of the said term, in as full, ample and beneficial manner as her then late husband was, to all intents and purposes whatsoever. PROVIDED, and so as such widow during such copartnership, shall find and pay a journeyman's wages, to do the working part in the said joint-trade; and so as she, the executors and administrators, be subject and liable to all and every the

The widow of either party dying, to be admitted a partner upon her giving 20 days notice.

To find a journeyman in the place of her husband,

and to be subject to covenants.

the covenants, clauses and agreements herein contained, *mutatis mutandis*, which on the part of her said husband are hereby covenanted to be paid, done and performed, or as near thereto as she can or may do.

PROVIDED NEVERTHELESS, that in case such widow at any time after such admittance into the said copartnership, shall be minded to relinquish and quit the same, that then and in such case, on her giving three months notice thereof to the surviving partner, it shall and may be lawful for such widow, at the end of such three months notice thereof, to be at liberty to leave and quit her said copartnership in the said trade. IN WITNESS, &c.

Such widow to be at liberty to quit the copartnership upon giving 3 months notice.

[No. II.]

Deed of Dissolution.

THIS Indenture made the — day of — in the — year of the reign of our sovereign lord George the Third, &c. and in the year of our Lord — between *A. B.* of — haberdasher of hats, of the one part; and *C. D.* of — aforesaid, haberdasher of hats, of the other part.

Parties.

Whereas by indenture of co-partnership or covenants bearing date the — day of — and made or mentioned to be made between the said *C. D.* of the one part, and the said *A. B.* by the name and description of *A. B.* of the borough of *Southwark* in the county of *Surry*, haberdasher of hats, of the other part, they the said *C. D.* and *A. B.* did mutually covenant and agree (under and subject to the provisions, conditions and agreements therein contained) to become, continue, and be co-partners and joint traders together in the trade and business of a haberdasher of hats, and in buying and selling of wool, tea, and such other commodities, goods, wares and merchandizes as they the said partners should mutually think fit and agree to trade or deal in, for and

Recital of a deed of co-partnership.

K k

during

during the full time and term of — years, to be accounted from the — day of — next ensuing the date thereof, if both the said parties should so long live, determinable nevertheless as thereafter mentioned; for the managing and carrying on of which said joint trade and undertaking, they the said parties agreed to bring in and make up in ready money or goods fit for the purpose, approved of and reasonably valued and appraised by and between themselves, or (in case of any difference between them) by such other indifferent and proper persons, appraisers, as they should mutually elect and agree upon for that purpose, a capital joint stock amounting to the sum or value of 6000*l.* whereof the said *C. D.* did thereby agree within one year after the commencement of the said co-partnership to bring in and advance in ready money or goods as aforesaid the full sum or value of 4500*l.* being 3-4th parts or shares thereof; and the said *A. B.* did also thereby agree within the same time of one year to bring in and advance in ready money or goods as aforesaid the full sum or value of 1500*l.* being the remaining fourth part of the said capital or joint stock: of and in which said joint stock, and of the gains, profit and increase to be made thereof, it was thereby declared and agreed, that the said *C. D.* his executors and administrators, should have and be intitled to three full fourth parts, the whole into four equal parts to be divided, as and for his share, interest and proportion thereof, and that the said *A. B.* his executors and administrators should have and be intitled to the remaining fourth part as and for his share, interest and proportion thereof. AND WHEREAS by an indenture bearing date the — day of — and made or mentioned to be made between the said *A. B.* of the one part, and the said *C. D.* of the other part, after reciting to the effect before recited; and also reciting that the said *C. D.* had advanced and paid into the said joint trade the said sum of 4500*l.* as and for his part and share therein: but the said

A. B.

A. B. not being able then to advance and pay his said fourth part or share, or any part thereof, had requested the said *C. D.* to lend the same upon his bond and the security next therein after mentioned, which he the said *C. D.* had agreed to. AND also reciting that the said *A. B.* by one bond or obligation under his hand and seal bearing even date therewith, became bound to the said *C. D.* in the penal sum of 3000*l.* with condition thereunder written for making the same void if he the said *A. B.* his executors or administrators should pay or cause to be paid to the said *C. D.* his executors, administrators or assigns, the full sum of 1500*l.* with interest for the same at the rate of 5*l. per cent. per annum* on the — day of — then next ensuing the date thereof, and as a further security for the re-payment of the said 1500*l.* and interest, he the said *A. B.* had agreed to release and assign his fourth part, share and interest, of and in the said capital joint stock, and of the gains, profits and increase thereof to the said *C. D.* in manner hereinafter mentioned. IT is by the said indenture now reciting witnessed, that for the consideration therein mentioned, the said *A. B.* did assign and set over, remise, release and quit-claim unto the said *C. D.* all that the said fourth part, share and interest of him the said *A. B.* of, in, and to the said capital joint stock and of all monies, goods, wares, merchandizes, debts and effects thereto belonging, and which, during the said co-partnership should or might belong thereto, and of the gains, profits and increase thereof, and all the estate, right, title, interest, property, profit, benefit, advantage, claim and demand of him the said *A. B.* of, in and to the same or any part thereof, to hold unto the said *C. D.* his executors, administrators and assigns, as his and their own proper monies, goods, wares, merchandises, chattels, debts, effects and estates, from thenceforth freely for evermore, subject to a proviso therein contained, for making void the same on payment of the said princi-

Partnership
established.

Business ha-
berdasher of
hats, &c.

Agreement
for dissolu-
tion.

pal sum of 1500 *l.* and interest, as therein particular-ly mentioned, as in and by the said recited indentures, relation being thereunto respectively had, may more fully and at large appear. AND WHEREAS the said *C. D.* and *A. B.* have ever since the said — day of — been and continued copartners and joint-traders, in the said trade or business of a haberdasher of hats, and in buying and selling of wool, tea, and such other commodities, goods, wares and merchandizes, as the said parties have thought fit to deal in, to the — day of — last past. AND WHEREAS the said *C. D.* and *A. B.* having drawn out an account of all their said partnership stock, debts and effects, and of their receipts and payments touching their said joint-trade and dealing, to the said — day of — last past, do find that the said trade hath not answered the end which was intended by the said copartnership, and that it is the interest of both the said parties to end and determine the same, whereupon it is agreed by and between the said *C. D.* and *A. B.* that the said copartnership trade and joint dealing shall accordingly end and determine as from the said — day of — last past; and that the whole partnership stock and debts shall vest in, and remain the property of the said *C. D.* and that he the said *C. D.* shall release unto the said *A. B.* all demands whatsoever, either on account of the said copartnership, or otherwise howsoever, save and except the sum of — lent by the said *C. D.* to the said *A. B.* and for payment of which the said *A. B.* has this day executed a bond to the said *C. D.* in the penalty of — *l.* and in regard the said trade has been carried on from the said — day of — last past, in the joint names of the said *C. D.* and *A. B.* the said *C. D.* in lieu of the profits which may have been made by the said joint stock from that time to the day of the date hereof (1-4th of which, if the copartnership had continued, would belong to the said *A. B.* after a deduction of the interest due to the said *C. D.* on the above mentioned security) hath agreed to allow from the said — day

— day of — last past to the day of the date hereof to the said *A. B.* wages for his trouble and time after the rate of 100*l.* a-year. AND forasmuch as the said *A. B.* hath, during all that time boarded the servants as in time of partnership according to the said in part recited articles, it is agreed, that the said *A. B.* shall be repaid the same, and an account has been this day settled by the said *C. D.* and *A. B.* of what is due to the said *A. B.* for the said board and wages, and also of what the said *A. B.* hath received from the said partnership stock since the said — day of — last, and there remains due to the said *A. B.* on the balance of the said account the sum of — AND WHEREAS the said *A. B.* hath agreed with the said *C. D.* to continue in the service of the said *C. D.* from henceforth to the said — day of — next, and from that time for another year at the option of the said *C. D.* so as he do signify the same in writing to the said *A. B.* two months at least before the expiration of the said term. AND the said *A. B.* hath agreed, that during the time that he shall be in the service of the said *C. D.* he the said *A. B.* shall diligently serve the said *C. D.* in the capacity of a shopman, and behave himself in every respect as a shopman ought to do. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for divers good causes and considerations, them the said *C. D.* and *A. B.* thereunto respectively moving, IT is hereby mutually covenanted, declared and agreed by the said parties to these presents, and the said *C. D.* and *A. B.* do severally and respectively for themselves, and for their several and respective heirs, executors and administrators, covenant, promise and agree to and with the other of them, his heirs, executors and administrators, that the said copartnership or joint trade and every part and branch thereof; and also the said recited indenture of the — day of —, and every covenant, article, clause, proviso and agreement therein contained, shall from the — day

2d partner
to continue
in the ser-
vice of the
other.

Considera-
tion.

Dissolution.

of — last be void and absolutely ended, determined, discontinued and dissolved, any thing in the said recited indenture of copartnership contained, to the contrary in any wise notwithstanding. AND the said *A. B.* in pursuance of the said agreement, and for and in consideration of the said sum of — *l.* of lawful money of *Great Britain*, being the balance of the said account, due to the said *A. B.* for the board and wages as aforesaid, to him the said *A. B.* in hand paid by the said *C. D.* at and before the enfealing and delivery of these presents, the receipt whereof is hereby acknowledged, and also for and in consideration of the covenants, releases and agreements herein contained on the part and behalf of the said *C. D.* his executors and administrators, and for divers other good causes and considerations, him thereunto moving, hath bargained, sold, assigned and released. AND by these presents, doth bargain, sell, assign and release unto the said *C. D.* his executors, administrators and assigns, all that the said fourth part, share and interest of him the said *A. B.* of and to the said capital joint trade, and of all goods, wares, merchandizes, monies, debts and effects thereto belonging, in any manner of way whatsoever, or in or to which the said said *A. B.* has any right, title or interest jointly with the said *C. D.* by virtue of the said copartnership. AND all the estate, right, title, interest, property, profit, benefit, advantage, claim and demand whatsoever, of him the said *A. B.* of in and to the said capital joint stock, effects, money and debts, and every or any part thereof; and all the profits, produce, gains, proceeds and advantages which have been or shall be hereafter made by the said partnership in any manner of ways whatsoever, so as the said *A. B.* his executors or administrators shall, or may have no claim or demand on the said *C. D.* his executors or administrators, on account of the same. To have, hold, receive and enjoy the said fourth part, share and interest, and all other the share and interest of him the said *A. B.* of, in, and to the said capital joint stock,

Settlement.

Assignment
of effects
to one partner.

Habendum.

stock, and of all goods, wares, merchandizes, debts, monies, profits and effects thereto belonging, and all and singular other the premises hereby assigned and released, or mentioned or intended so to be, and every part and parcel thereof, with their and every of their appurtenances unto the said *C. D.* his executors, administrators and assigns, to and for his and their own proper use, benefit and behoof, and as his and their own proper goods and chattels for ever. AND the said *A. B.* for himself, his executors and administrators, in further pursuance of the said agreement, and to enable the said *C. D.* his executors and administrators to receive all the said partnership debts and effects, to and for his and their own use and benefit, hath made, ordained, authorised, constituted and appointed, AND by these presents, BOTH make, ordain, authorise, constitute and appoint the said *C. D.* his executors and administrators to ask, demand, sue for, recover and receive of and from all and every person and persons whatsoever, all and every the debts, sum and sums of money, goods, chattels and effects whatsoever and howsoever, now due and owing or belonging to the said copartnership in any manner of ways whatsoever, and upon receipt of the same, or any and every of them, or any and every part and parcel of them, and every of them to give, sign and execute proper and sufficient releases, acquittances and discharges for the same; and for that purpose, he the said *A. B.* doth hereby give and grant unto his said attorney and attornies, full power and authority to state and settle all accounts and differences, any ways relating to the said copartnership joint trade, with all and every person and persons whatsoever, and to compound and release all and every, or any part of the said debts and demands, as he and they shall think fit and necessary. AND to do all and every other act, matter and thing whatsoever, in and about the premises, as fully and effectually to all intents and purposes as he the said *A. B.* could or might do if personally present. AND the said *A. B.* doth hereby for

Power of
Attorney

to receive
debts, &c

K k 4

Confirmation
of acts.

Covenant,

not to re-
lease debts,
&c.for further
assurance.Release
from assignor
to assignee.

himself, his executors and administrators ratify and confirm all and whatever the said *C. D.* his executors or administrators shall or may lawfully do or cause to be done in and about the premises, by virtue of these presents. AND the said *A. B.* doth hereby for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said *C. D.* his executors, administrators and assigns, that he the said *A. B.* his executors, administrators or assigns, shall not, nor will at any time or times hereafter receive, release, acquit or discharge any of the debts or demands, due to the said copartnership, or any actions or suits that shall be brought, sued or commenced for, or on account of the same, without the consent of the said *C. D.* for that purpose in writing, first had and obtained. Nor shall, nor will do, or suffer, or cause to be done, any act, matter or thing whatsoever, whereby the said *C. D.* his executors, administrators, or assigns shall, or may be hindered or obstructed in the recovering and receiving of the said debts, goods, chattels and effects, due, owing and belonging to the said copartnership, or any part thereof; but shall and will from time to time, and at all times hereafter, at the cost and charge of the said *C. D.* do, perform and execute all and every further and other lawful matters and things for the better enabling him the said *C. D.* his executors, administrators or assigns to get in and receive the same, to and for his and their own use and benefit as aforesaid. AND the said *A. B.* for the considerations assigned, HATH remised, released, and forever quit-claimed. AND by these presents, BOTH for himself, his executors and administrators, remise, release, and for ever quit-claim unto the said *C. D.* his executors and administrators, all and all manner of action and actions, cause and causes of actions, suits, differences, controversies, quarrels, bonds, covenants, notes, bills, damages, estate, right, title, claims and demands whatsoever, both in law and equity, which he the said *A. B.* now hath, or which he his executors, administrators

trators or assigns can or may at any time or times hereafter have, claim, challenge or demand against the said *C. D.* his heirs, executors or administrators for or by reason or means of the said copartnership, or any other matter, cause or thing whatsoever, from the beginning of the world to the day of the date hereof, save and except the covenants, clauses and agreements herein after contained on the part and behalf of the said *C. D.* his executors and administrators, to be paid, done or performed. AND the said *C. D.* in pursuance of the said agreement, and in consideration of the above mentioned assignment and release, doth hereby accept of the said joint stock, debts and effects, in full of all demands, which he or his executors or administrators have or can, or may have on the said *A. B.* his executors or administrators, for or by reason or means of the said copartnership or joint dealing, or on any other account whatsoever, except as herein before and after is excepted. AND the said *C. D.* HATH remised, released, and for ever quit claimed, AND by these presents, BOTH for himself, his heirs, executors, and administrators, remise, release, and for ever quit-claim unto the said *A. B.* his executors and administrators, all, and all manner of action and actions, cause and causes of actions, suits, differences, controversies, quarrels, bonds, covenants, notes, bills, damages, claims and demands whatsoever and howsoever, both at law and in equity, which he the said *C. D.* now hath, or which he his executors, administrators or assigns can or may at any time or times hereafter, have, claim, challenge or demand of or against the said *A. B.* his heirs, executors or administrators, for or by reason or means of the said copartnership, or any other matter, or thing relating thereto, or any other matter, cause or thing whatsoever, from the beginning of the world, to the day of the date hereof, save and except the covenants and agreements herein contained, on the part and behalf of the said *A. B.* his executors and administrators, to be done and performed.

Acceptation.

Release from assignee to assignor.

AND

Covenant to
pay debts.

Indemnify,
&c.

Covenant
for second
partner to
be the shop-
man to the
other,

AND also, save and except the said sum of — so as
aforesaid, due from him the said *A. B.* to the said *C. D.*
by virtue of the said above mentioned bond, bearing
even date herewith as aforesaid. AND the said *C. D.*
doth hereby for himself, his heirs, executors and ad-
ministrators, covenant, promise and agree to and with
the said *A. B.* his executors and administrators, in
manner following, (that is to say), That he the said
C. D. his executors and administrators shall and will,
as soon as conveniently may be, pay and discharge all
debts and demands whatsoever, due and owing from
the said *C. D.* and *A. B.* on account of the said co-
partnership, or which he the said *A. B.* his executors
or administrators shall or may be liable to pay, satisfy
or make good jointly with the said *C. D.* for or by
reason or means of the said copartnership. AND also,
shall and will from time to time, and at all times
hereafter, well and sufficiently save, defend, keep harm-
less and indemnified the said *A. B.* his heirs, executors
and administrators, and his and their, and every of
their estate, goods, chattels and effects of, from and
against all costs, payments, charges, demands and
expences whatsoever and howsoever, which he the said
A. B. his heirs, executors or administrators, or his or
their estate, goods, chattels or effects shall or may suf-
fer, sustain or be put unto, for or by reason or means
of the said copartnership, joint trade or dealing, or for
or by reason or means of the said *C. D.* his executors
or administrators, making use of the name of the said
A. B. in any suit or action for the recovery of the said
copartnership's debts and effects, or by reason or means
of his being made defendant in any suits, or any other
matter or thing whatsoever, relating to the said co-
partnership. AND it is hereby mutually agreed by
and between the said parties to these presents, that the
said *A. B.* shall continue and be a servant as a shop-
man to the said *C. D.* in the said business, from this
time to the — day of — now next, at the wages
and after the rate of 100 *l.* year, which the said *C. D.*
hereby

hereby agrees to pay him by monthly payments, that is to say, — *l.* on the last day of every calendar month, to be computed from the date hereof, and in proportion thereto for the fraction or remainder of a month on the last day of the said term. AND that he the said *A. B.* shall continue afterwards in the service of the said *C. D.* for one year longer, to commence from the — day of — next in case the said *C. D.* shall think fit, to continue him the said *A. B.* so long in the said service, and shall signify such his intention in writing, at least two months before the said — day of — next, at and after the rate and wages of 100 *l.* a year, payable by monthly payments as aforesaid. AND that the said *A. B.* during the time he shall be in the service of the said *C. D.* shall diligently attend the business of the said *C. D.* as a shopman, and behave himself in every respect as a shopman ought to do. IN WITNESS.

and to be
continued at
the option
of first.

I N D E X.

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IF an action is brought against one partner only, no advantage can be taken of the omission, but by plea in abatement *Page* 347
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- Items in a partnership account relating to the particular interest of the book-keeper, will not be supported *310*
- According to the custom of *England*, if two joint merchants occupy their stock, goods and merchandize in common, to their common profit, one of them naming himself a merchant, shall have an account against the other, naming him a merchant and charge him as his receiver *50*
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- An action cannot be maintained by several partners for

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- Where there is a partnership demand, all the partners should join in the action, for the contract and undertaking is joint *335*
- One partner may maintain an action for money had and received against the other partner for money received to the separate use of the former, and wrongfully carried to the partnership account *213*

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- A man entering into an agreement and afterwards subdividing his beneficial interest under it, among others, is alone liable to the performance, and the sub-contract does not constitute a partnership *45*
- A. B. C.* and *D.* enter into an agree-

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On the failure of *A.* the ostensible buyer, *B. C.* and *D.* are not answerable to the seller as partners Page 48

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Where two persons carry on the trade of a brewer, and one of them has served a regular apprenticeship, but the other has not, the partner not having served such apprenticeship, is not liable to the penalty of the statute 5. *Eliz. c. 4.* The policy upon which that act was made having from experience become doubtful 74

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Assignees under a commission of bankrupt against one partner, can only be tenants in common of an undivided share, subject to all the right of the other partner 202

Joint assignees not permitted to prove against the separate

estate, the balance of a long account due from the partner to the partnership

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Assumpsit.

On the dissolution of a partnership between *A. B.* and *C.* a power given to *A.* to receive all debts owing to, and to pay all those owing from the late partnership does not authorize him to indorse a bill of exchange in the name of the partnership, though drawn by him in that name and accepted by a debtor to the partnership, after the dissolution. The person therefore to whom he so indorsed, cannot maintain an action on it against *A. B.* and *C.* as partners.

405

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Assumpsit for partnership debts may be brought against one partner only, and unless he pleads in abatement, he shall be afterwards concluded

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Af-

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How partners should declare in *assumpsit* 50, 51

If two persons jointly engage in a stock-jobbing transaction, and incur losses, and employ a broker to pay the differences, and one of them repay the broker *with the privity and consent of the other*, the whole sum, he may recover a moiety from that other in an action for money paid to his use, notwithstanding the 7 Geo. 2. c. 8. which avoids and declares illegal all stock-jobbing transactions 233

But in such a case of an illegal transaction, if one partner pay money for another, *without an express authority*, he cannot recover it back 244

If there are two partners, and one buys goods for both, and the other dies, the survivor may be charged by *indebitatus assumpsit* generally

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Bankruptcy.

Bankruptcy and certificate of one partner, does not discharge the others, 10 Ann. c. 15. s. 3. Page 359

An act of bankruptcy by one partner, is to many purposes a dissolution of the partnership 412

If one of two partners commit a secret act of bankruptcy, the other partner may, for a valuable consideration, and without fraud, dispose of the partnership effects, and tho' he himself afterwards become bankrupt, the assignees under a joint commission cannot maintain trover against the *bonâ fide* vendee of such partnership effects 200

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A commission of bankrupt against one of several partners, is to be considered as an execution, and not as an action 413

The assignees under a commission of bankruptcy against one partner, can only be tenants in common of an undivided moiety, subject to all the

the rights of the other partner *Page 202*

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A commission of bankrupt may issue against one partner for a debt due by the partnership *413*

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Where partners become bankrupts, the allowance is to be divided between them, in the proportions in which the surplus of their respective separate effects, and their respective proportions of the joint fund, have contributed to the payment of the joint debts *210*

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A bond creditor to whom the partners were jointly and severally bound, may make his election to come against the joint, or separate estate, but not against both, except for the deficiency, and after the other creditors are paid *361*

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Certificate of one partner bankrupt not to discharge his copartner *359*

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Special partnership may be contracted under a charter-party *113*

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The King by his charter may constitute fraternities, or companies, for the management of foreign or domestic trade

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57

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57

If one or more persons enter into a public company, and become sharers of the joint stock, yet it is not a partnership

58

Consent.

Consent is necessary to complete every contract

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A contract made by two partners to pay a certain sum of money to a third person, equally out of their own private cash, is a joint contract, and they must be jointly sued upon it

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Money lent to a trader by a partner who retires from business, at legal interest, with an additional annuity for a certain term of years, is not a *continuance* of the partnership

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Where persons in trade have been connected in various partnerships, and a joint com-

com-

commission taken out against them all, an order has been made for keeping distinct accounts of the different partnerships, as well as the separate estates of each partner *Page 312*

A joint and several creditor must elect whether he will prove against the joint or separate estate *361*

But he may come in upon the surplus of the other, if there should be any *361*

If a creditor of one partner takes out execution against the partnership effects, he can only have the undivided share of his debtor; and must take it in the same manner the debtor himself had it, and subject to the rights of the other partner *202*

A bond creditor to whom the partners were jointly and severally bound, may make his election to come against the joint, or separate estate, but not against both, except for the deficiency, and after the other creditors are paid *361*

Death.

Partnership is dissolved by the death of one of the partners,

unless special covenants to the contrary *Page 431*

Debt.

A debt due from a partnership is a legal debt to support a separate commission *413*

One partner bringing trust-money into the trade without the knowledge of the other, it is a separate debt *362*

But if it is done with the knowledge and consent of all the partners, it is a joint debt *363*

Dissolution.

On the dissolution of a partnership between *A. B. and C.* a power given to *A.* to receive all debts owing to, and pay those owing from the late partnership, does not authorise him to indorse a bill of exchange in the name of the partnership, though drawn by him in that name, and accepted by a debtor of the partnership after the dissolution: so that the indorsee cannot maintain an action on the bill against *A. B. and C.* as partners *405*

An act of bankruptcy by one partner, is to many purposes a dissolution of the partnership *Page 412*

If partners dissolve their partnership, persons who deal with either, *without notice* of such dissolution, have a right against both *201*

If a partnership is dissolved by consent, that does not determine the legal interest, which continues as before; so that the property of the stock of the partner so going out, is not divested thereby, but he remains equally entitled as joint-tenant with the other *168*

Effluxion of Time.

A partnership determined by effluxion of time; one intends to continue the trade, the other will not, insisting upon a division; and on non-compliance brings an action at law, or a bill in equity for an account, and to restrain the disposing of those goods, the possession of which is wrongfully kept from him by his partner; who pending this becomes bankrupt: this would not be within the statute *21 Jac. 1. c. 19.* *179*

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A court of equity will not in general entertain a bill for a specific performance of contracts for *chattels*, or which relate to *merchandise*, but leave it to law *26*

Partnership dealings are properly cognizable by courts of equity *68*

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What shall be deemed sufficient evidence of a former partnership being determined *37*

Execution.

Execution may be sued out against one partner for a debt due by the partnership *351*

If partners be of goods, and execution be sued by *fi. fa.* against one for his separate debt, the sheriff may seize the whole, in order to inventory and appraise them, and to have a true account of the value; but he can sell only the share of him against whom the *fi. fa.* was sued *273*

And

And notwithstanding such seizure of the whole, the other partner continues in possession of his share or moiety

Page 274

Where, on an execution against one of two partners, the partnership effects were taken and sold, the court ordered the sheriff to pay over to the other a share of the produce, proportioned to his share in the partnership effects, to be ascertained by the master

165

Executors.

An executor and surviving partner cannot be jointly sued, because the first is charged *de bonis testatoris*, and the other *de bonis propriis*

52

Representatives of partners in the capacity of executors do not succeed to the state and condition of partners

130

No person deriving under the partner can be in a better condition; his executor to many purposes stands in the very same light

202

Partnership shall not subsist for the benefit of an executor

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Farmers.

The law of *jus accrescendi*, upon the death of one of several partners in a farm, distinguishable from that respecting traders in general

Page 436

Liability.

Acts subsequent to the time of delivering goods on a contract, may be admitted as evidence to shew that the goods were delivered on a partnership account, if it were doubtful at the time of the contract: but if it clearly appear that no partnership existed at the time of the contract, no subsequent act by any person, who may afterwards become a partner, (not even an acknowledgment that he is liable, or his accepting a bill of exchange drawn on them as partners for the very goods) will make him liable in an action for goods sold and delivered; though he will be liable in an action on the bill of exchange

376

A man entering into an agreement, and afterwards subdividing his beneficial interest under it amongst others,

L 1 3

is

is alone liable to the performance *Page 46*

Where a bill or note is drawn in favour of two or more, in partnership with one another, an *indorsement* by one will bind both, if the instrument concern their joint trade *54*

If one partner pay the whole of a partnership debt without any express promise from the other, the law gives him a right to recover it back in an action for money paid to the use of that other partner, and it proceeds on this ground, that both are liable to pay, provided the contract be legal *244*

But in the case of illegal contracts, as they are not bound to pay, one of them cannot acquire a right of action against the other by paying the whole without his consent; in such case it is necessary to have the consent and direction of that other *244*

To make a man liable as a partner, there must either be a contract between him and the ostensible person to share jointly in the profits and loss, or he must have permitted the other to make use of his credit, and to

hold him out as one jointly liable with himself *Page 38*

Where two partners agreed to borrow a sum of money of a third person, but only one gave a bond, and the other witnessed it, the money was afterwards entered in the cash-book of the partnership; upon a bankruptcy happening, a joint commission was taken out, and the obligee named in such bond was considered entitled to come in and prove his debt under the joint commission *330*

If a bill is drawn by two, payable to "*us, or our order,*" and subscribed by both, tho' not in partnership, they make themselves partners by the form of the bill, to the effect of making an indorsement by one of them valid *367*

But the custom of merchants may make such indorsement void *372*

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Four sorts of merchants, *viz.* adventurers, dormant, travelling, and resident; neither of which take by survivorship *439*

Between joint merchants the remedy survives, but not the duty *439*

The Law-Merchant is part of the law of England *65*

Partner.

- One partner may be a creditor of another, and prove his debts under a separate commission *Page 205, 206*
- One partner bringing trust money into the trade without the knowledge of the other, it is a separate debt 362
- But if it is done with the knowledge and consent of all the partners, it is a joint debt 363
- If one partner has taken out more than his share of the partnership property, the joint estate cannot prove against the separate before the separate creditors are satisfied 209
- Unless the partner took out money with a view to defraud the joint estate *ibid.*
- How partners should sue, and be sued 335, 336
- In what cases one partner may be sued without the rest, and in what cases he may sue 336, 337
- How to take advantage of improperly suing a partner *ib.*
- If one partner is out of the kingdom, and not amenable to the process of the court, the *defendant* may proceed singly against the other: but the *plaintiff* must first proceed to outlawry against the partner who is absent *Page 356, 357*
- If partners expressly mention their shares in one respect only, either solely in regard to gain, or solely in regard to loss, their shares of that which is omitted shall be the same as of that which is mentioned 28
- If a partner shares in the advantages, he shall also share in all the disadvantages of the partnership concern 89
- Dormant partners are liable when discovered 41
- A dormant partner may be, without having served an apprenticeship to the particular trade 74
- Each partner is considered as the authorised agent of the other, and all are implicated in the joint concerns, to the fullest extent 137
- One partner may be a creditor of the partnership to ten times the value of all the effects 202
- If one of two partners become bankrupt, the solvent partner may, if for a valuable consideration and without fraud, dispose of the partnership effects; and if he afterwards fail, the assignees under a joint commission against

gainst both, cannot maintain trover against the *bonâ fide* vendee of such partnership effects *Page 193*

After a dissolution of partnership by agreement, by an execution, or by a bankruptcy, the partner out of possession of the partnership effects, has the same lien on any new goods bought in, which he had upon the old

201

One of three partners in a ship and cargo, the out-fit of which was 4,658*l.* pays only 410*l.* in part of his third share, and gives his notes for the remainder; but before they become due, is a bankrupt; the other partners cannot, by voluntarily discharging the notes, stand in his place for the share of the profits; but the assignees are entitled to a *full third*, both of the profits and of the value of the ship *155*

Where a person relies on the faith of several partners, though one only is concerned, all shall be charged *66*

If a bill is drawn by two, payable to "*us, or our order,*" and subscribed by both, tho' not in partnership, they make themselves partners by the form of the bill, to the effect of making an indorse-

ment by one of them valid

Page 356

If two are partners, as *attornies* and *conveyancers*, and *one* receive money to be laid out on mortgage, the *other* is answerable for the amount, though his partner gave only his own *separate receipt* for it *9*

The being a partner, or not, is a matter of fact which he who is a partner cannot but know *34*

Partners are joint tenants in the stock and effects, and they continue so throughout *2*

Partners in merchandizing with, or otherwise concerned in run goods, the Crown may come against any one for the penalty *259*

Proof need only be that the goods came into his power, or into his agent's custody *ibid.*

If a partner is a creditor upon the partnership fund, he can have no satisfaction but out of the surplus, which shall remain after the joint creditors are paid *210, 211*

Partnership.

Partnership is a voluntary contract, between two or more persons, for joining together their

their money, goods, or labor, upon an agreement that the gain or loss shall be divided proportionably *Page* 1
 From what time a partnership shall be said to commence

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What share in a partnership a person shall be said to have

36

What is necessary to constitute a partnership

38

To constitute a partnership there should be a concern in the sale, as well as purchase of things bought together

49

When money is advanced to a trader, the true criterion is to consider whether the profit or premium is certain and defined, or casual, indefinite and depending on the accidents of trade. In the former case it is a *loan*, in the latter a *partnership*

23

In a general partnership to carry on trade, the sale by one partner is the sale by all, and therefore though one sells the goods, or merchandizeth with them, yet action must be brought in all their names

71

Part-owners.

Part-owners are tenants in common of a ship

91

If one of several part-owners of a ship objects to a voyage the others propose making, he may by process out of the admiralty arrest the ship, and compel the other part-owners to give security for her safe return

Page 94

By the common law, as applied to part-owners, each of them is possessed *per my et per tout*

96

An action on the case for negligence of the master lies against the part-owners of a ship, as well as against the master; but all the part-owners ought to be joined

341

The master of a ship is not to be considered as a partner

99

The law considers a master upon all occasions, to be an officer, who must render and give an account of the whole charge, when once committed to his care and custody

100

A master of a ship may bring trespass as a bailiff of goods may

101

If a master of a ship buys provisions for the ship, and has money from the owners to pay for them, but fails without paying the money, the owners are liable in proportion to their respective shares

112

Pleading.

If one partner only brings an action where the contract was joint, the defendant may take advantage of it at the trial, and nonsuit the plaintiff; but in the case of a *tort*, this must be pleaded in abatement Page 336

In *torts*, all the trespassers need not be made parties; but in actions upon contract, every partner must be made a defendant 343

The sale by one partner is the sale by all, and therefore though one sells the goods, or merchandizeth with them, yet action must be brought in all their names; and in such case the defendant shall not be received to wage his law, that the other partner did not sell the goods to him, as is supposed in the declaration 71

Where an action is brought against two joint debtors, and one only appears, the creditor may have judgment for his whole debt against the person appearing, and by default against the person who does not appear 346

If *A.* pleads a partnership between himself and *B.* and after issue joined, a partnership is proved between *A.*

B. and *C.* this would be conclusive against the defendant Page 355

If an action is brought against one partner only, no advantage can be taken of the omission, but by plea in abatement 347

In a joint demand where one of the creditors will not join in the action, he is summoned and severed, and the other has judgment *quod sequatur solum* 357

Privilege.

No copartner in any trade or undertaking is entitled to the privilege of Parliament 221

Rent.

If in articles of partnership it is stipulated, that the rent of the premises shall be paid out of the *private cash* of one of the parties; these words only mean, that the rent shall not be paid out of the partnership 331

Rights.

Respecting the rights of partners 201

Nothing can be considered as the exclusive right, or actual

al share of one partner, but his proportion of the residue, upon a balance being struck, of the accounts between them *Page* 155

Where one partner takes out more money from the partnership stock than his share amounted to, the other has a right to come upon the separate estate *pro tanto* 205

If one partner has taken out more than his share of the partnership property, joint estate cannot prove against the separate before the separate creditors are satisfied 209

Unless the partner took out money with a view to defraud the joint estate *ibid.*

Where a partner brings an action in his own right for money received after the death of the other partner, the defendant may set off whatever was due to him from the plaintiff 213

Nothing is to be considered the exclusive right of one partner, but his proportion of the residue upon balance of the partnership accounts 155

Smuggling.

Smuggling is a trading within the bankrupt laws 276

An action cannot be maintained by several partners for goods sold by one of them living in *Guernsey*, and packed by him in a particular manner for the purpose of smuggling, though the other partners who resided in *England* knew nothing of the sale; for it is a contract by subjects of this country, made in contravention of the laws: and such a case must be considered in the same light as if all the partners resided in *England*

Page 224

If one of two partners advance money in a smuggling transaction, he cannot recover his proportion of it against his partner, because the transaction is prohibited 241

If partners are concerned in smuggling, though not all together when the act is done, yet each may individually be prosecuted for the penalty; though at the same time the King can have but one satisfaction 256

Statute of Limitations.

An acknowledgment by one partner, is sufficient to take a case out of the Statute of Limitations.

Limitations as against the others *Page 372*

Though the Statute of Limitations has been always construed to except accounts open between merchant and merchant, yet that is to be understood with this distinction, that if open accounts be by subsequent acts continued, they are not to be barred by the intervention of such length of time from the original transaction

304

The Statute of Limitations pleaded by one partner to a bill brought by another for the balance of an account, and allowed

304

Statutes.

5 <i>Eliz. c. 4.</i>	74
1 <i>Jac. 1. c. 15.</i>	417
21 <i>Jac. 1. c. 19.</i>	173
5 <i>W. & M. c. 20.</i>	53
3 & 4 <i>Annæ c. 9.</i>	<i>ibid.</i>
4 & 5 <i>Ann. c. 17.</i>	359
8 <i>Ann. c. 7.</i>	258
9 <i>Ann. c. 14.</i>	228
10 <i>Ann. c. 15.</i>	359
2 <i>Geo. 2. c. 22.</i>	316
5 <i>Geo. 2. c. 30.</i>	315
7 <i>Geo. 2. c. 8.</i>	248
7 <i>Geo. 2. c. 15.</i>	102
7 <i>Geo. 2. c. 28.</i>	233
8 <i>Geo. 2. c. 18.</i>	271
8 <i>Geo. 2. c. 24.</i>	316

Stock-jobbing.

If two persons jointly engage in a stock jobbing transaction, and incur losses, and employ a broker to pay the differences, and one of them repay the broker, *with the privity and consent of the other*, the whole sum, he may recover a moiety from that other in an action for money paid to his use, notwithstanding the 7 *Geo. 2. c. 8.* which avoids and declares illegal all stock-jobbing transactions *Page 233*

Survivorship.

Where money is owing to two partners, and, after the death of one, it is paid to a third person, the surviving partner may maintain an action for money had and received in his own right, and not as *survivor* 213

The same of money received after the testator's death, for which his executor may maintain *assumpsit* in his own right 213

The survivor and the executor cannot join in an action 51

There shall be no benefit of survivorship in copartnership dealings 438

Though

Though there is no benefit by survivorship amongst merchants, yet if two joint-merchants contract with a bailiff, the contract is entire and joint, and by the death of one survives to the other *Page 73*

If one partner dies, though the debts and effects survive, yet the survivor is considered in equity barely as a trustee for the representatives of the deceased 168

If there be two partners in trade, and one of them buy goods for them both, and the other dieth, the survivor may be charged by *indebitatus assumpsit* generally, without taking notice of the partnership, or that the other is dead, and he survived 220

In articles of copartnership it is not necessary to provide against survivorship 443

Title.

The title of partners is undivided, whether each individual partner contributes exactly in the same proportion or not 1

Tort.

If one partner only brings an action where the contract

was joint, the defendant may take advantage of it at the trial, and nonsuit the plaintiff: but in the case of a tort, this must be pleaded in abatement *Page 336*

In torts, all the trespassers need not be made parties; but in actions upon contract, every partner must be made a defendant 343

Trover.

One partner cannot bring trover against another 205

Usury.

If *A.* upon a loan of money, stipulate to take half the profits upon a re-sale of goods to be purchased by the borrower, which profits exceed 5 *l. per cent.* and *A.*'s principal is not risked, *quære*, if such contract be not *usurious* 278

In all partnership contracts where money is furnished by one side only, if the casualty goes to the interest of such money only, and not to the principal, it is usury 295

A bond in the penalty of 200 *l.* conditioned for the performance of articles of partnership, is not an usurious contract 298

Distinction

Distinction to be taken between an usurious contract within the statute, and an unconscionable bargain

Page 282

If the borrower of money give a bond for the principal and interest at *5 l. per cent.* and covenant at the same time also to pay to the lender a

certain portion of profits of trade, this is an usurious contract, and the obligee cannot recover on the bond

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If interest and principal be secured, and it be at the will of the party who is to pay it, it is no usury 297

F I N I S.



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